Office Supreme Court, U. S.
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CLERK.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1894

No. 870

In the Matter of the Petition of THOMAS THOMAS, Claimant of the Steamship "DELAWARE," for a Writ of Certiorari in the Suit of

The Steamship "DELAWARE," THOMAS, Claimant
Appellant

against

CHARLES H. WINNETT and others
Libelants-Appellees

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

CONVERS & KIRLIN
Proctors for Petitioner

J. PARKER KIRLIN
Of Counsel

Supreme Court of the United States, 1

October Term, 1894.

The Steamship "DELAWARE,"
THOMAS THOMAS,
Claimant, Appellant,

AGAINST

CHARLES H. WINNETT and others,
Libelants, Appellees. 2

In the Matter of the Petition of Thomas Thomas, for a Writ of Certiorari.

TO THE HONORABLE THE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The petition of Thomas Thomas, claimant of the British steamship *Delaware*, in the suit of Charles H. Winnett and others, against the said steamship, respectfully shows unto the Court as follows: 3

FIRST.—On September 20, 1893, Charles H. Winnett and others, owners, master and crew of the steamtug *Talisman*, filed their libel against the steamship *Delaware*, whereof your petitioner, Thomas Thomas, was master, in the United States District Court for the Eastern District of New York, to recover damages sustained in a collision between the *Talisman* and the

4 *Delaware*, at the entrance of Gedney's Channel, off Sandy Hook, New York, on the morning of September 16, 1893. The owner of the *Talisman* claimed damages for the loss of the *Talisman*, which was sunk in the collision; the master claimed for personal injuries received by him in the collision; and the members of the crew sued for the loss of their effects.

Your petitioner duly appeared and filed a claim to the said steamship, and a stipulation for value, on the 21st of September, 1893, and filed his answer October 28, 1893.

SECOND.—On February 15th and 19th and March 2, 1894, the cause came on to be tried before Honorable Charles L. Benedict, District Judge, upon the evidence adduced by
5 the respective parties, and on May 7, 1894, the District Judge filed a decision in writing (*Record*, p. 167), in which he held the *Delaware* solely in fault for the collision. On March 8, 1894, an interlocutory decree and order of reference were entered, and on August 7, 1894, a final decree was entered in favor of the libelants for the sum of $21,318.70.

THIRD.—Upon the trial, the following facts appeared:

The collision occurred at 10.04 A. M. of September 16, 1893 (*Record, fol.* 254), in the middle of Gedney's Channel, just inside a line drawn across the outer buoys (*Libel, fol.* 16; *Berry*, 89, 100, 104; *Waugh*, 290; *Notice to Mariners, fol.* 152; *Cracroft*, 371; *Harpenau*, 596, *and see Diagrams annexed to Petition*).

6 The charted course of Gedney's Channel is west northwest, ½ west.

The weather had been thick and rainy during the morning, but it had cleared so the vessels saw each other for four or five minutes before the collision, if not longer, and when the vessels were about a mile apart (*Winnett, fol.* 131; *Cracroft, fol.* 378, 449; *Harpenau, fols.* 577, 578).

The *Delaware*, in charge of a New York pilot, was making for the entrance of the channel between the outer can buoys from a point something to the northward of the channel (*fols.* 83, 84, 112, 113, 159, 161), and for the last three-quarters of a mile before reaching the outer buoys

was on a magnetic course west by south (*Harpenau*, 576, 577, 578, 616, 617). 7

The *Talisman* was towing the pilot boat *Driggs*, from a point to the northward of the channel back to her station outside the black can buoy, which is the outer buoy on the southerly side of the channel, and for the last four or five minutes and say one-third of a mile before the collision, was on a magnetic course south-southeast (*Libel*, *fol.* 13; *Berry*, 82, 99). There was thus between their courses an angle of 9 points. The tide was flood setting up at that point; there was no wind (*fols.* 619, 579, 580, 598).

As neither vessel changed its course, the bearing of each from the other must have remained unchanged for four or five minutes preceding the collision. Annexed hereto 8 is (1) a diagram showing the courses of the vessels to the place of collision as contended by the *Delaware*, and (2) a diagram used by the *Talisman* in the Court of Appeals showing the approaching courses as claimed by libelant. There is no substantial difference between them.

The *Delaware* is a tank steamer 345 feet long (*fol.* 181), was in ballast, and was making about ten knots [by calculation of revolutions, pitch of screw and slip, 9.69 knots (*fol.* 251)] before her engines were stopped a length off the collision (*fol.* 612), and when the vessels struck she was going about three or four knots (*fols.* 390, 527, 593).

The *Talisman* was an ocean tug 100 feet long (*fol.* 119), and before and at the time of collision was making about five knots (*Berry*, *fols.* 83, 99; *Waugh*, 287, 305; 9 *Underwood*, 490); her engines were making sixty revolutions, 120 being full speed (*fols.* 321, 323, 328). She had the *Driggs* on a hawser 20 or 30 fathoms long (*fols.* 81, 72, 267, 384); the *Driggs* herself was 80 feet long (*fol.* 177). The procession was therefore from 300 to 360 feet long, substantially the length of the *Delaware*.

When the *Delaware* is supposed to have been about a mile off, the *Talisman* sounded ***a single blast upon her whistle*** (*fols.* 85, 132), to which it is admitted in the evidence the *Delaware* did not reply (*fols.* 135, 85). When the *Delaware* was from one-quarter to one-eighth of a mile off, the *Talisman* sounded ***another single blast*** (*fols.*

10 86, 136), which the libel (*fol.* 15), the evidence of Captain Berry of the *Driggs* (*fol.* 114), of Captain Winnett himself (*fol.* 146), and that of six witnesses from the *Delaware* (*fols.* 193, 200, 385, 454, 456, 486, 530–1, 559, 592) show was not answered; though libelants endeavored by the testimony of three witnesses (*fols.* 69, 263, 272, 325) to make out a case of agreement in signals as alleged in the libel (*fol.* 14). When the *Delaware* was probably two of her lengths off (*fols.* 137–138, 550, 197) the *Talisman* sounded a signal of *three short blasts* (*fols.* 550, 137–8).

It is acknowledged in the libel that when the Talisman blew her second single blast signal "the steamship was approaching too near for safety" (*fols.* 14–15).

No change *of helm or speed* was made by the *Talisman* before the collision (*fols.* 134, 137, 159, 286, 321, 323, 328).

11 No change of helm or speed was made by the *Delaware* until she was about two lengths off the collision (*fol.* 612), when her captain came on the bridge, and finding collision imminent, the *Talisman* being two points on the starboard bow (*fol.* 193), and a couple of ship's lengths off (*fol.* 197), ordered the engines stopped and reversed (*fol.* 244), and the helm hard astarboard (*fols.* 195, 196), but too late to avert a collision, the *Delaware* striking the *Talisman* on the port quarter (*fol.* 198), and dragging her along for about the steamer's length (*fols.* 199, 169, 352, 390), shearing off to port owing to the drag of the wreck on the port side (*fols.* 204–5) until the *Talisman* sank 160 feet inside the channel (*fol.* 152).

The reason the pilot of the *Delaware* did not port and
12 pass under the stern of the pilot-boat was that he had the red Can buoy close under the starboard bow, and feared if he ported at all the flood tide would carry him up on to it and his propeller would foul the Can chain (*fols.* 582–4). By the time he was clear of that, he was in such position that it was impossible to use the port helm since that would have carried him right into the pilot-boat (*fols.* 204, 584–5, 165); therefore, he could only stop and reverse, which was done, but too late (*fols.* 202, 584–585, 595). He desired to enter the channel, so as to navigate in by the buoys; the weather was again getting thick *fol.* 597).

The *Talisman* was head to the tide, and could have 13
slackened speed or stopped without danger (*fol.* 598). Her captain could have seen, had he noticed, that the *Delaware* had the Can buoy close on the starboard bow on approaching it, and therefore could not port and still pass to the southward of it, which he must have known was the intention of the pilot of the *Delaware*, from the persistent heading of the vessel for a point between the outer buoys for a considerable time before the collision, with no sign of a change of course (*fols.* 112–113).

The engineer of the *Talisman* and the pilots on the pilot-boat saw there was immediate danger of a collision at the time the *Talisman* blew her second single blast, when the *Delaware* was about an eighth of a mile off (*fols.* 86, 87, 292, 325). The pilots on the *Driggs*, at that time, hard ported 14
their helm, and at the time of the collision had swung off three or four points, and got out their lifeboat, so that although their tow line was not dropped until parted by the collision, the pilot-boat escaped all damage (*fols.* 292–3, 301–2, 305–6, 312, 364).

The collision occurred as above stated just at the entrance to the channel, and about at its centre line (*fols.* 16, 89, 100, 104, 290, 371, 596).

The District Judge held (1) that it was the duty of the tug to keep up her speed; (2) that the situation justified the pilot of the tug in supposing that the steamship would go under his stern or stop, and repelled any supposition that the steamship would pass ahead of him and over to the western [southern] side of the channel, and (3) that 15
the *Delaware* was solely in fault (*Rec.*, *fol.* 668).

The District Judge failed to rule on the point whether the *Talisman* was in fault for failing to navigate in accordance with her whistle signals as required by Article 19 of the Regulations, apparently treating the signals as given under the Supervising Inspection Rules (which are not in force at the place of collision), and did not pass on a defense pleaded in Section 3 of "An Act relating to navigation of vessels, &c.," approved February 13, 1893.

FOURTH.—The appeal of the claimant who admitted fault by the *Delaware*, but alleged contributing fault by

16 the *Talisman*, was heard in the Circuit Court of Appeals, at the March session, 1895, and at the conclusion of the argument the Court announced its decision, orally holding, (1) that it was the duty of the *Talisman*, in the circumstances, to keep on her course and maintain the same speed; (2) that the *Talisman* was justified in supposing the *Delaware* would alter her course by porting so as to pass under the stern of the pilot-boat; (3) that if, in view of the evident risk of collision from the fact that the *Delaware* showed no change of course or swing indicating an intent to pass under the pilot-boat's stern by porting, the *Talisman* should have slackened speed or stopped, her fault in not doing so was a fault *in extremis*; (4) that it would have
17 been a fault for the *Talisman* to have ported pursuant to her repeated single-blast signals, and that she was not in fault for omitting to shape her course "in accordance with the signals made"; (5) and that the *Talisman* was not in any fault contributing to the collision.

Thereupon the Court ordered an affirmance of the decree, subject, however, to the answers of this Court to certain questions which it certified to this Court touching the defense pleaded by the *Delaware* under the act of Congress aforesaid.

The said certificate was filed in this Court March 13, 1895, and has been duly docketed by the appellees as No. 941 of October Term, 1894.

FIFTH.—Afterwards your petitioner applied to the said
18 Circuit Court of Appeals for a rehearing of the cause upon the merits, or in the alternative that the Court would certify certain further questions to this Court, namely, (1) whether the *Talisman* was or was not in fault for failing to slacken speed or stop, and (2) whether she was or was not in fault for failing to change her course in accordance with the whistle signals made; but on March 21st an order was made denying both of said applications. The petition for rehearing and for a further certificate appears in the record (pp. 179).

SIXTH.—Thereupon your petitioner prays that a writ of *certiorari* may issue from this Court to the said Circuit

Court of Appeals requiring the whole record to be certified 19
to this Court for its consideration, for the following reasons:

1. Because at the time the *Talisman* blew her second single-blast signal, the *Delaware* being then, on libelant's evidence, from one-eighth to a quarter of a mile off, there was risk of collision so plain that it had been averred in the libel, and such immediate danger that the engineer of the *Talisman* saw it and the pilots on the *Driggs* realized it, ported their helms and got their lifeboat ready. Under Articles 18 and 23, the *Talisman* was under a plain duty to slacken speed and stop.

2. Because in reaching the conclusion that the *Talisman* 20
was bound in the circumstances to keep her course and maintain the same speed, the Court apparently misinterpreted the decision of this Court in the *Brittania and Beaconsfield*, 153 U. S., 130.

3. Because there had been no change of course or swing, or promise or indication of change or swing, to justify the *Talisman* in supposing the *Delaware* would pass under his stern, but on the contrary the *Delaware*, on libelant's evidence, had been and was swinging slightly to port, as if under a starboard helm, thus indicating she intended to pass ahead, and she had plainly refused to answer the *Talisman's* single blast signals, thus negativing any supposition that she intended to pass astern of the pilotboat 21
(her reason for not taking that course being want of room to do it without entangling the steamer's propeller in the buoy chains or colliding with the tow).

4. Because the Court's opinion that it could not have been supposed the *Delaware* would attempt to pass ahead and on the southerly side of mid-channel was apparently to some extent based on Article 21, which requires vessels *in* narrow channels to keep to the starboard side; whereas that rule had no application to the case in hand, since the *Delaware* was not *in* the channel, but was maneuvering to get in at the instant of collision.

22 **5**. Because the Court's conclusion that the fault of the *Talisman*, if any, was a fault *in extremis*, virtually means that the preferred vessel under the starboard hand rule can keep right on to the point of collision in face of the most obvious risk and the most immediate danger, without ever slackening or stopping, and then be absolved from blame because she supposed until too late that the other vessel would see and correct her error, although there were no signs from her navigation that she would do so.

6. Because Articles 18 and 23 are cumulative precautions against the loss of life and property by collision, and both life, and property in a large sum, have been lost owing to the *Talisman's* obstinate persistence in her supposed rights under Article 22 and her utter and willful
23 non-observance of Articles 18 and 23.

7. Because it is immaterial whether porting and stoding in accordance with her whistle signals would have been an independent fault or not, the duty to do so being compulsory by Article 19 if the signals are made, and further, because it appears that if she had so ported she would have crossed the *Delaware's* course at a point ahead of where the *Delaware* stopped in the water; if she had stopped after the three-blast signals she would not have reached the line of *Delaware's* course, and thus in either case there would have been no collision; and further, because in deciding that the *Talisman* was not bound to make the changes indicated by her whistle the Court vir-
24 tually overruled its own previous decision in *Singlehurst* v. *La Compagnie General Transatlantique*, 11 U. S. App., 693, where it held the preferred vessel in fault for omitting to port in accordance with a single blast signal.

8. Because the decision that notwithstanding the apparent risk and immediate danger of collision, and no sign of any prospective change of course by the other vessel, the *Talisman* was justified in keeping up her speed to the point of collision in the hope that the other vessel would see and attempt to correct her error, and that her fault, if any, in omitting to slacken or stop was a fault *in extremis*, virtually overrules a long line of cases in the

Circuit Court for the Second Circuit, from Judge Nelson's time down to the present, and at least twenty-five or thirty cases decided by Judge Brown in the Southern District of New York, and establishes a new rule of decision for starboard hand cases. 25

9. Because the case is one of gravity and importance to commerce generally and to the parties from the large amount involved.

10. Because as another branch of the case has already been certified to this Court, no greater delay to the parties would ensue, and this Court would be in a better position to pass upon the matters involved if the whole record were before the Court. 26

SEVENTH.—Your petitioner presents herewith a certified copy of the transcript of record returned from the District Court to the United States Circuit Court of Appeals, and of the record in the last named Court.

WHEREFORE, your petitioner prays that this Honorable Court will cause the writ of *certiorari* to be issued, pursuant to the power vested in this Court by an act of Congress, entitled "An Act to establish Circuit Courts of Appeals, and to define and regulate, in certain cases, the jurisdiction of the Courts of the United States, and for other purposes," approved March 3, 1891, requiring the said United States Circuit Court of Appeals for the Second Circuit to certify the whole record and cause to 27 this Court for consideration, and that thereupon this Court will decide the whole matter in controversy in the same manner as if the cause had been brought to this Court for review by appeal.

And your petitioner will ever pray, &c.

THOMAS THOMAS,
By CONVERS & KIRLIN,
His Proctors.

28 SOUTHERN DISTRICT OF NEW YORK, }
City and County of New York, } ss.:

E. B. CONVERS, being duly sworn, says: That he is one of the proctors for the petitioner herein, and that the foregoing petition is true to the best of his knowledge, information and belief; and he further says that the reason why this petition is not verified by the petitioner is that the petitioner is absent at sea, and that this petition is made and presented by his authority and that of the owners of the said steamship *Delaware*.

Deponent verily believes that the decision in this cause relates to matters of gravity and importance affecting the
29 safety of life and property at sea and in the coast waters of the United States, and that the decision of the United States Circuit Court of Appeals herein is erroneous in the particulars before mentioned. He further says that the foregoing application for a writ of *certiorari* is meritorious and not made for the purpose of delay, and that in his judgment the case is a proper one for the extraordinary relief authorized by the statute.

E. B. CONVERS.

Sworn to before me this 23d }
day of March, 1895. }

FREDERICK GREEN,
[SEAL.] Notary Public,
30 N. Y. County.

EVENING POST JOB PRINTING HOUSE, N. Y.

Office Supreme Court, U. S.
FILED.
MAY 20 1895
JAMES H. McKENNEY,
CLERK

Supreme Court of the United States,

OCTOBER TERM, 1894.

The Steamship "DELAWARE,"
THOMAS THOMAS,
Claimant and Appellant,

AGAINST

CHARLES H. WINNETT and others,
Libellants and Appellees.

No. ~~959~~ 570

MOTION FOR ADVANCEMENT OF CAUSE.

TO THE HONORABLE THE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The petition of Thomas Thomas, claimant and appellant, respectfully shows:

The petitioner concurs in the application made by the libellants for the advancement of the cause, but does not assent to the statements, arguments or inferences contained in the motion made by the libellants.

The grounds on which the petitioner moves the advancement of the cause for hearing, is, that there is necessarily involved in the cause, a construction of the third section of an Act of Congress, entitled, "An Act Relating to Navigation of Vessels, Bills of Lading,"

&c., approved February 13, 1893 (being 27 Statutes at Large, Chap. 105).

That part of the section material to the decision of the present case, is:

"That if the owner of any vessel transporting merchandise or property to or from any port in the United States of America, shall exercise due diligence to make the said vessel in all respects seaworthy and properly manned, equipped and supplied, neither the vessel, her owner or owners, agents or charterers, shall become or be held responsible *for damage or loss resulting from faults or errors in navigation*, or in the management of said vessel," &c.

The claimant, denying responsibility for the collision, by his answer, pleaded the said statute in the alternative, and claimed the benefit of it, in case it should be held the *Delaware* was in fault.

The evidence showed that the pilot of the *Delaware*, in whose charge the vessel was at the time of the collision, had been guilty of negligence in navigation, and the question was thus necessarily raised, did the third section of the statute afford exemption?

It appeared from the evidence that the Anglo-American Oil Company, a corporation of Great Britain, was the owner of the *Delaware;* that due diligence had been exercised by the said company to make the said steamship in all respects seaworthy and properly manned, equipped and supplied; that she was engaged in the business of transporting merchandise or property to and from ports of the United States, pursuant to the provision of said third section of said act, and that the pilot in charge of the vessel at the time of the collision was a compulsory pilot, and was duly licensed by law.

Assuming fault on the part of the *Delaware* for half damages (the claimant's contention being that the *Talis-*

man was also in fault for disregarding Articles 18, 23 and 24 of the Regulations to Prevent Collisions at Sea, and for violating Article 19 thereof), the question is necessarily involved, whether the third section of the said Act of Congress affords to the *Delaware* and her owner, exemption from responsibility for said half damages caused by the collision.

This question is one of great importance to commerce, is constantly arising in the lower courts, and was, in the present case, certified to this Court for its decision. The question thus certified will now come on to be heard with the merits of the cause, this Court having granted claimant's petition for a writ of *certoriari*, and having thus brought up the whole cause for decision under the present number.

The same defense has been alleged in other pending cases, which are now awaiting trial in the District Court and in Circuit Courts of Appeals, and in view of the fact that the Circuit Court of Appeal for the Second Circuit has certified the question of the force and effect of said statute in collision cases to this Court, other courts, in which the question is involved, have been and will be embarrassed in their decisions, until this question is definitely settled and finally determined by this Court.

Your petitioner, therefore, respectfully prays that the said cause may be advanced and set down for hearing at as early a day as the convenience of the Court will admit of, and he will ever pray, &c.

NEW YORK, May 18, 1895.

THOMAS THOMAS,
Claimant.

J. PARKER KIRLIN,
Of Counsel.

Office Supreme Court U. S.
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CLERK.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1894

No. 959 970

In re Petition of THOMAS THOMAS, Claimant of the Steamship "DELAWARE," for a Writ of Certiorari to the Circuit Court of Appeals for the Second Circuit, in the Suit of

The Steamship "DELAWARE," THOMAS THOMAS,
Claimant-Appellant

vs.

CHARLES H. WINNETT and others
Libelants-Appellees

BRIEF IN SUPPORT OF PETITION

CONVERS & KIRLIN
Proctors for Petitioner

J. PARKER KIRLIN
Of Counsel

Supreme Court of the United States.

IN RE PETITION OF THOMAS THOMAS, Claimant of the Steamship "DELAWARE," for a writ of *certiorari*.	*Brief for Petitioner.*

The facts and the reasons upon which the petitioner bases his application are set forth briefly in the petition, to which reference is here made.

POINTS.

I.

The Court erred in refusing to hold that the *Talisman* was in fault for infringing Article 18 of the Regulations, which requires that every steamship on approaching another ship so as to involve risk of collision, shall slacken her speed or stop and reverse, if necessary.

Those in charge of the *Delaware* had sighted the *Talisman* and the *Driggs*, and those on the *Driggs* had sighted the *Delaware* fully a half hour before the collision (*fols.* 573, 83, 258, 283). The *Delaware*

was then heading right for the Channel (*fol.* 576); a heavy shower came on, with thick weather, about this time, and the pilot of the *Delaware* seeing a tank steamer coming out through the Channel, ported his helm about half a point so as to be well above her course as she came out during the squall (*fol.* 516).

When the squall passed over, the pilot made the red buoy of Gedney Channel about a half point on his port bow, he judged about a mile off (*fols.* 576, 577). He then starboarded about a point to bring the buoy on the starboard bow. After he had starboarded a point, his course was W. by S. ½ S. compass (*fols.* 577, 578), or correcting the error of the compass, W. by S. magnetic (*fols.* 616, 617). After he had steadied on that course, he again saw the pilot-boat and the tug apparently in the position in which they were before the squall (*fol.* 578), namely, off to the northward of Gedney Channel (*fol.* 573).

From the time the helm was starboarded one point and the course set W. by S. magnetic, as above shown, the course of the steamer was not altered (if at all) until she was within two lengths of the place of collision (*fol.* 590). The captain was not on the bridge until the vessels were close together, being engaged with his papers in the chart-room (*fols.* 191–2).

It was the intention of the pilot to get inside the Channel and navigate up along the line of the buoys, as the weather was again threatening to become thick (*fol.* 597).

The course and apparent intention of the *Delaware* to enter the mouth of the Channel were seen and understood both by those on the *Talisman* and those on the pilot-boat. When first sighted she was "heading right in for the Channel," and she continued to bear in for the mouth of the Channel all the time until the collision (*fols.* 83, 112–13, 159, 161, 347), which occurred about mid-channel, just inside of the line of the outer electric buoys (*fols.* 16, 89, 100, 104, 290, 371, 596).

When Captain Winnett picked up the pilot-boat, which was anchored about a mile off her station (*fol.* 121), he started to tow her back on a course S. E. or S. E. by S. (*fol.* 125). Owing to the rain he could see no buoys at that time (*fol.* 126). When it cleared up (at the time the pilot of the *Delaware* saw the red can buoy, and steadied his course W. by S.), Captain Winnett found he was about a quarter of a mile in a northwesterly direction from the red can buoy, just outside of buoy G2, on the northerly side of the Channel (*fol.* 128). He then shaped his course S. S. E., having the outer black can buoy on the southerly side of the Channel a little on his port bow (*fols.* 128, 129, 82), intending to anchor the tow at her station on the bar, a short distance outside the black can buoy.

After he had shaped his course S. S. E., having the black buoy a little on the port bow, and was about a quarter of a mile from the red can buoy, he sighted the *Delaware* about a mile off (*fols.* 130, 131), and bearing about E. from him, as he supposed. According to the positions of the vessels, worked back from the place of collision to the time the weather cleared and each pilot found his bearings, as shown by calculations based on course and speed the *Delaware* would have been bearing about E. by S. from the *Talisman*.

Winnett admits the *Delaware* was then heading a little to the southward of west (*fol.* 131), but claims that her smokestack and mast were just open to him and he could see her port side. This must obviously be an error for *starboard* side, as from the course the *Delaware* pursued during the last mile before the collision it is impossible she could have been far enough north so that heading to the southward of west (as admitted by Capt. Winnett, *fol.* 131) and for the mouth of the Channel (as stated by the pilots on the *Driggs*, *fols.* 83, 84, 159, 161), any part of her port side could have been visible to Capt. Winnett from the position in which his vessel then was (see diagrams annexed to petition).

Furthermore, Capt. Winnett says that at the time the smokestack and mast were just open to him and he could see the *Delaware's* port side: "I then blew one blast on my whistle" (*fol.* 132).

If he saw the port side of the steamer a mile and a quarter off, he would of course know that she was on a course to pass far astern of him, and a single blast on his whistle, in those circumstances, would have been absurd.

As the *Talisman* was on a course S. S. E. and the *Delaware* on a course W. by S. there was an angle of nine points between their courses, and the *Delaware* in point of fact must have been bearing 5 points on the *Talisman's* port bow during the last four or five minutes preceding the collision, and the *Talisman* must have been 2 points on the *Delaware's* starboard bow, the bearings continuing relatively the same, *which should have been certain warning of collision.*

These bearings correspond very nearly with the evidence (*Waugh*, 305; *Flannery*, 347; *Peyton*, 522; *Thomas*, 193).

Captain Winnett speaks of the *Delaware* as being on his beam (*fols.* 131, 137) at various times, "heading right at us" (*fol.* 134), and claims that all the port side of the steamer was in sight to him when she was an eighth of a mile off (*fols.* 137, 138), and that she then began to swing strongly to starboard and swung right down upon him.

The witnesses from the steamer and the *Driggs'* pilots both agree that there was no swinging on the part of the steamer, and that she maintained a steady course until Captain Thomas had the helm put hard astarboard, and when that order was finished, she was not more than a ship's length off the collision (*fol.* 612), too near to swing appreciably before the blow.

The testimony from the *Delaware* that her helm was not changed is entitled to greater weight than the mere opinion of Winnett that she was swinging

under a starboard helm all the time before collision (The *Alexander Folsom*, 6 U. S. App., 153).

Furthermore, the best and most specific evidence upon this point is given by the engineer of the *Talisman*, who, in place of attending to his engines, stood looking out of the engine-room door at the *Delaware*, and never took his eyes off her from the time she was a mile off until the collision, and who states: "I seen no change of course by either boat" (*fols.* 323, 324). When the boats were close, he sent men aft to cut the line. He then describes the way the vessels came together, as follows:

"Q. Did you hear anything from the men after they went aft? A. No; I waited in the engine-room for a reply that they had cut the line or let it go, but I got none.

Q. How long did you wait? A. Till both the boats lapped; that is, *the Talisman had gone far enough across the ship's bow to reach the Talisman's house*, and then I went out on deck and grabbed hold of the house on the starboard side.

Q. You were standing there at the time of the collision? A. *I waited*, and *saw the steamer passing, just going along like that* (indicating), and saw her hit us" (*fol.* 329).

From this, it appears clearly that the *Talisman* was crossing the *Delaware's* bow, and not that the *Delaware* was swinging up on to her under a hard astarboard helm, as Captain Winnett claims, since, if she had swung in that way, and her bow had got as far along the side of the tug as "to reach the *Talisman's* house," it is inconceivable how she would have swung back again towards the stern so as to come into collision with the *Talisman's* port quarter.

Flannery's statement of "seeing the steamer passing, just going along like that," means that he saw the bow of the *Delaware passing down* the port side of the *Talisman* from forward aft to the port quarter, where the collision occurred, which must have been due to the forward motion of the

Talisman, and not to a port swing under a starboard helm by the *Delaware*.

Furthermore, Walle, first deckman on the *Talisman*, says that he was below, and was called up when the steamer was about ten fathoms off; "she was then heading right to our *bow*" (*fol.* 69), and he made a diagram showing the bearings, which appears opposite page 18. As the collision occurred at the stern, it must be that the *Delaware* was not swinging either way to any substantial degree, and that the collision on the stern of the *Talisman* was due to her getting that far across the *Delaware's* stem.

Captain Winnett's theory that the vessel was swinging to port for the last minute before the collision is evidently based upon a conclusion on his part as to the effect of Captain Thomas' hard astarboard order which was disclosed in the first testimony taken in the case.

In point of fact, nobody looked at the compass or can say whether the *Delaware's* head swung off to port at all before the collision. The generally accepted theory at the present time is that a hard astarboard helm and reversed engines in a ship furnished with a right-handed screw will cant her head to starboard rather than to port, opposite to the way it would go if the engines were kept going ahead. That her head did not go off to port until after she was in collision, and was then dragged around by having the weight of the *Talisman* dragging on her port side, while she went her length or more after the collision, is shown by the testimony of many witnesses that the angle of the collision was substantially a right angle, and by the diagrams drawn by the various witnesses, which show the vessels in collision at nearly a right angle.

Admitting that the *Talisman* did not swing at all, had the *Delaware* swung three points before the collision, the angle of collision must have been one of six points instead of an angle of eight or nine, as stated by the witnesses.

In *Todd and Whall on Practical Seamanship*, the action of the helm on the vessel is stated (p. 23), as follows:

"WHEN THE VESSEL HAS HEADWAY.

Port Helm—Head goes to starboard.
Starboard Helm—Head goes to port.
That is, with headway, her head goes the opposite way to which the helm is put.

"WHEN THE VESSEL HAS STERNWAY.

Port Helm—Head goes to port.
Starboard Helm—Head goes to starboard.
That is, with sternway, her head goes the same way as the helm is put.
The effect of a screw propeller alone, on the ship's head, is—

"RIGHT HAND SCREW.

Engines going ahead—Head goes to port.
Engines going astern—Head goes to starboard."

Further, they say (at p. 26).

"*Whilst reversing, the rudder produces none of its usual effects to turn the ship, but, such as it is, its effect is to turn the ship in the opposite direction from that in which she would turn if the screw were going ahead;* but this effect is not much in any case. The influence of the rudder being feeble, the vessel is at the mercy of any other influences that may act upon her, as wind or tide. * * * As her headway diminishes the screw will begin to act on her head and turn her to starboard or port, according as the propeller is a right or left-hand one. Most steamers' heads would thus be inclined to go to starboard, but it requires acquaintance with any particular vessel, laden and light, to be able to tell how she will act going astern."

In *Marsden on Collisions* (3d Ed.), pp. 453, 454, the result of English experiments to ascertain the effect of a reversed propeller upon the course of a vessel is stated substantially to the same effect:

"The propeller exerts considerable turning power on the ship, whether going ahead or astern, but more particularly when going astern. This seems to depend upon the fact that the lower blades of

the propeller, being more immersed, have a greater turning power than the upper. The effect is most strongly marked when the propeller is going astern and the ship has headway through the water—the circumstances under which Article 18 is usually applicable. The turning effect is in the one direction or the other, according as the screw is right or left handed, * * * when the same is not deeply immersed and froths air with water, it exerts, when reversed, considerable power to turn the ship's head, independently of the rudder, the ship turning to starboard or port almost irrespective of the helm, according as the screw is right or left handed. * * * Whilst the ship has headway through the water, and the engines and screw are working astern, the action of the rudder *is the reverse* of that which it has whilst the engines and screw are going ahead. * * * So marked is this diminution in the turning capability of a ship with her screw suddenly reversed from full speed ahead, that, under some circumstances, a vessel running at right angles upon a straight coast at full speed might avoid going ashore by keeping on full speed ahead with her helm hard over, when she could not keep off the shore by stopping and reversing her engines."

See also note by Judge Brown in the *Aurania*, 29 Fed. Rep., 98, 121.

The evidence from the *Delaware* shows that the tugboat, at all times prior to the collision, was on the steamer's starboard bow. There is no intimation in her evidence, nor in that from the *Driggs*, that the tugboat ever got far enough across the course of the *Delaware* to see her port side until the very instant of the collision. The pilot of the *Delaware* states that the *Talisman* was never far enough across the bow for her captain to see the port side of the *Delaware* until the steamers were perhaps 20 feet apart (*fols.* 592, 594).

It is, therefore, submitted that the approach of the vessels was substantially as shown on the diagram for at least four and a half minutes before the collision; that the master of the *Talisman* could have seen, had he looked, that the bearing of the *Delaware* always continued the same, namely,

about five points on his port bow—a certain warning of collision—and that the question of his fault must be judged on this state of facts, and not on his own claim that the *Delaware* was always pointing astern of him or for his beam, and was following him up, under a hard astarboard helm, with the apparent purpose only of getting into collision with his port quarter.

Whatever, therefore, may have been the fault of the *Delaware*, it is claimed that the *Talisman* was equally in fault in approaching the other vessel under circumstances involving *risk of collision, which was acknowledged in the libel* (*fols.* 14–15), without obeying the mandate of Article 18, by slackening speed, or, if necessary, stopping and reversing.

The District Judge exonerated the tug because:

(1.) He found that when the *Delaware* approached near the tug, the tug had reached the western side of the Channel, and the situation justified the pilot of the tug in supposing the steamship would go under his stern; and

(2.) Because the situation repelled any supposition that the steamer would pass ahead of the tug over to the western side of the Channel; and

(3.) Because it was the duty of the tug, under the rule requiring her to keep her course, also "*to keep up her speed.*"

As the pilot of the *Delaware* knew he was making much more rapid speed than the *Talisman*, he, in point of fact, expected to do the thing the Court found he did not expect to do—to cross ahead of the *Talisman*. The diagram shows that it would have required an exceedingly smart maneuver, if the thing were possible at all, for the *Delaware* to port after she rounded the Red Can Buoy, which she was plainly intending to do, so as to get under the stern of the pilot boat, and it is significant that

Captain Winnett himself did not expect her to accomplish this, but only expected her to cut the tow line and pass through the twenty or thirty fathoms space between the stern of his boat and the bow of the pilot boat (*fol.* 165).

The navigators of the *Delaware* said it could not be done.

The significant omission of the pilot of the *Delaware* to answer with a single blast the signal sounded by the *Talisman* at about the time the vessels were from $\frac{1}{4}$ to $\frac{1}{8}$ of a mile apart was a warning to Captain Winnett that the pilot of the *Delaware* was not intending to port his helm.

The engineer of the *Talisman* and the pilots on the pilot boat did not expect the *Delaware* would be able or intended to pass under their stern (*fols.* 325, 87, 292–3), for when she was at least an eighth of a mile off, they saw the collision was unavoidable, hard ported the helm of the pilot boat and got their life yawl overboard.

It is difficult to see how, on this undisputed state of facts, the District Judge could have found that the situation repelled the supposition that the steamship would pass ahead of the tug and over to the western side of the Channel. His error in this regard may be ascribed in part to his finding that the collision occurred at the western side of the Channel, instead of substantially in mid-channel, *as averred in the libel* and proved by the most reliable evidence in the case (fols. 16, 89, 100, 104, 290, 371, 596).

The Circuit Court of Appeals did not state this finding as one of the grounds of its decision.

The real ground of the decision of the District Judge, it is believed, is found in his statement that as the vessels were upon crossing courses, and the *Talisman* had the right of way, the duty of the *Talisman* was not only to maintain her course, but "to keep up her speed."

The decision upon this point is in line with his well-known views as expressed in his previous decisions in cases under the starboard hand rule. Allusion is here made to the cases of the *Favorita*, the *Columbia*, the *Frisia* (*infra*), and others.

In the *Favorita*, 1 *Benedict*, 30, Judge *Benedict*, under circumstances of risk and danger similar to those existing in the present case, held the *preferred vessel in fault for stopping*, but his decision was reversed on appeal by Judge *Woodruff*, 8 *Blatchf.*, 539, whose decision was affirmed in the Supreme Court, 18 *Wall.*, 598. The Court say:

"It is said that if the *Manhanset* had advanced instead of stopping, she would have cleared the steamship. This may or may not be true, but if true, she is not in fault for this error of judgment."

In the *Columbia*, 23 Blatchf., 268, a case much resembling the present, the tug *Baxter* was entering East River with a tow astern, and had the *Columbia* bound for South Ferry Slip on starboard hand. The *Columbia* blew one whistle, which was not answered. She proceeded one hundred yards, and then blew another single blast, the *Baxter* meantime keeping right on. After the second single blast, the *Baxter* gave a signal of two blasts. The *Columbia* then stopped and backed. Judge Benedict held the *Baxter* solely in fault. On appeal, *held* both in fault, the *Columbia* for *omitting to stop when her first signal was not answered* and risk of collision became obvious. Mr. Justice *Blatchford* (p. 270) said:

" The District Judge says in his opinion (8 Fed. Rep., 716), that no doubt the collision would have been avoided if the *Columbia* had been stopped in time to permit the *Baxter* to pass; but that, as the *Columbia* had the right of way, she had a right to keep on. I cannot assent to this view. When the *Columbia* received no response to her first signal of one whistle, she ought to have stopped and backed, instead of giving her second signal of one whistle.

She saw that the *Baxter* was persisting in going on, and was not responding affirmatively by a signal of one whistle, and that there must be a collision if the *Columbia* also kept on. It was the duty of the *Baxter* primarily to keep out of the way, and the correlative duty of the *Columbia* to keep her course; that duty was imposed on the *Columbia* for the purpose of enabling the *Baxter* to keep out of the way. *But it was not permissible for the Columbia to persist in going on, under the plea of keeping her course, when she saw that her signal was not affirmatively responded to by the Baxter.* On the contrary, under Rule 21 of Section 4233, there then became risk of collision, and it was the duty of the *Columbia* to 'slacken her speed, or, if necessary, stop and reverse'; and, under Rule 24, special circumstances existed which made it necessary for the *Columbia* to stop, 'in order to avoid immediate danger.' The fault of the *Baxter* was no excuse for the fault of the *Columbia*. The situation was plain to the *Columbia*, and she was bound to deal with it as it existed, not as it ought to have been. These principles are established by decisions of the Supreme Court (*Chamberlain* v. *Ward*, 21 How., 548, 567, 568; The *Gray Eagle*, 9 Wall., 505, 510; The *Maria Martin*, 12 Wall., 31, 47; The *Ariadne*, 13 Wall., 475, 479; The *Cayuga*, 14 Wall., 270, 275, 276; The *Continental*, *Id.*, 345, 359; The *Sunnyside*, 91 U. S., 208, 214, 215; The *America*, 92 U. S., 432, 438)."

In the *Frisia*, 24 *Blatchf.*, 40, a steamer collided with a bark towed by a tug on a hawser. The courses of the steamer and the tug were crossing, and involved risk of collision, and the tug had the steamer on her own starboard side. The tug attempted to cross ahead of the steamer, without an agreement of signals, and although this was plainly seen by those in charge of the steamer, she did not stop and reverse until a collision was unavoidable. The District Court (BENEDICT, *J.*) held that the

Frisia, preferred vessel, was without fault, and that the tug was solely responsible. On appeal, the decree was reversed, and the *Frisia* was held in fault. BLATCHFORD, *J.*, in delivering judgment, said (at p. 48):

"As to the *Frisia*, he" (the District Judge) "held that the whistles of the tug were all of them blown when the *Frisia* was so close at hand that stopping and reversing her engines was the only thing then to be done by her towards avoiding a collision, and that, in the absence of timely whistles from the tug, the *Frisia* was not chargeable with knowledge of the intention of the tug to attempt to cross the bows of the *Frisia*. The District Judge said: 'If, notwithstanding the omission of the tug to give timely notice by her whistle, the circumstances were such as to inform the steamer in time that the tug was intending to cross her bows, such circumstances cast upon the steamer the duty, by a timely change of her course or slacking of her speed, to avoid the danger attending the course selected by the tug. I find in the circumstances proved nothing calculated to convey such information to the steamer.'

"The course of the *Frisia* being south-southwest and that of the tug being west-northwest, it was necessarily apparent to those on the *Frisia* that the tug was crossing the course of the *Frisia* at right angles. * * *

"The answer also says, as to the *Frisia:* 'Those in charge of her navigation first saw the tug *John N. Parker* and the bark *James L. Harway* in tow thereof about three points or more on the port bow of the steamship, and distant three-quarters of a mile. The *Frisia* continued upon her course, which was about south southwest, and those in charge of her navigation seeing that the said tug and bark were taking no measures to avoid the steamship, though it was their duty to do so, blew a single blast of the steam whistle to call the attention of the tug and bark to their duty, and to warn them to go under the stern of the steamship. The said signal was unheeded by the tug and bark, and they continued at undiminished or at increased speed on a course crossing the course of the *Frisia*, ahead of the *Frisia*.' It is also apparent, from the testimony of the chief officer and the pilot of the *Frisia*, that

they saw all the time that the tug was on a course crossing the bow of the *Frisia*, and was intending to cross her bow, and that they thought the *Frisia* could do no harm by keeping on. Under these circumstances, the duty of the *Frisia*, under Rule 21 of Section 4233 of the Revised Statutes, to at least slacken her speed much sooner than she did, was plain."

This case was tried on February 15th and 19th (*fol.* 42), but the decision was not handed down until March 7th, a few days after the decision of the *Britannia* and *Beaconsfield* case, 153 *U. S.*, 130, which, it is claimed, decides that Article 18, requiring a steamship when approaching another ship so as to involve risk of collision to slacken her speed, or stop and reverse if necessary, does not apply to the preferred vessel under the starboard hand rule.

In that case the *Beaconsfield*, which was on the *Britannia's* starboard hand, stopped and lay still in the water for a minute and a half, in full view of the tardy motions of the *Britannia* in getting astern, and after an agreement of single blast signals, and was found in fault for so doing. That is not an authority for the proposition that the duty of the preferred vessel to keep her course requires her to maintain the *same* speed.

Mr. Justice *Shiras* (*p.* 138) said:

"Rule 21 [Revised Statutes Rules] provides that *every steam vessel when approaching another vessel so as to involve risk of collision, shall slacken her speed, or, if necessary, stop and reverse.* This rule was likewise obeyed by both ships in that so long as they were advancing after having seen and signaled each other they went at a slow rate of speed. Later in the history of the incident they both stopped and reversed. * * * Whether the *Beaconsfield* was justified in stopping and reversing we shall presently consider."

This is a plain indication that the Court did not there mean to hold that the slackening-for-risk rule had no application to preferred vessels under the starboard hand rule.

An analysis of the opinion of the majority of the Court shows that two faults were found against the *Beaconsfield:* (1) Failure to keep her course; (2) remaining motionless in the water for a minute and a half in view of the tardy motions of the *Britannia* in getting astern, in accordance with her signal (*p.* 139).

Mr. Justice *Shiras*, in dealing with the English cases under this rule, said:

"It is argued that the words 'shall keep her course' do not mean that she shall maintain her speed, and English cases are cited to the effect that the rule does not imply that the vessel shall *maintain the same speed.* If this is all that is meant in the cases cited, and we so read them, *we have no reason to disagree with them*, and they do not in the slightest degree impugn our reasoning. But if the contention is, and if those cases must be understood as holding that the vessel whose duty it is to keep her course, complies with that duty by reversing her engines and ceasing to move at all, we are unable to concur in such a view."

He further says:

"It is not meant that some exigency or obvious danger might not justify her in checking her speed and even in stopping altogether. But such a case is provided for in the 24th Rule. As we have seen, no such exigency is found to have existed in the present case."

The *Britannia* case, it is submitted, announces no new rule or principle of decision. It was decided upon peculiar facts, and with sole reference thereto.

It was soon followed by a further decision under the same rules, that of the *Breakwater*, 155 U. S., 252. A ferryboat left her slip in New York bound for Jersey City. The *Breakwater*, arriving from sea, was proceeding northward along the line of the New York docks, about 400 feet distant therefrom, and about opposite Barclay street, about 880 feet southward from Chambers street. She was going at the rate of six miles an hour, against a strong

ebb tide and northwest wind. As the *Pavonia* moved slowly out under a hard aport wheel, her bow swung southerly down the river with the force of the wind and tide. *She sounded a single whistle, and the Breakwater replied with the same.* The *Pavonia* then put her engine to full speed and made another blast, to which the *Breakwater* made the same reply. Meanwhile the *Pavonia* had recovered from her downward swing and swung up the river on her course. When the *Breakwater* sounded her first whistle her engines were immediately stopped. When she sounded the second her engines were put full speed astern. The stem of the *Breakwater* was in collision with the port side of the *Pavonia*. *Breakwater* was alone in fault, and the *Pavonia* was excused for failing to slacken her speed, because the effect of so doing would have caused the tide to carry her down upon the other vessel.

Mr. Justice *Brown*, in delivering the opinion of the Court (at *p.* 264), said:

"No fault is to be imputed to the *Pavonia* for her failure to stop and reverse, since it is quite obvious that if she had slackened speed her tendency to sag down the river would have been greatly increased, and she would practically have been at the mercy of the wind and tide. Her only safe course was to do precisely as she did, put her wheel hard aport and her engine at full speed astern. *The duty to slacken speed* manifestly does not apply where the effect would be to carry a steamer bodily down the current upon another vessel which is trying to avoid her."

Although this case reaffirms the *Britannia*, 153 *U. S.*, 130, as to the general duty of a preferred vessel navigating under the starboard hand rule to keep her course and speed, it plainly implies that *the duty to keep speed does not necessarily mean the same speed; and that special circumstances which require the preferred vessel to slacken speed and stop, do not necessarily mean anything more than an obvious risk of collision from keeping up the same speed.*

It is not presumed that the Supreme Court in the *Britannia* and *Breakwater* cases meant to overrule the principles laid down in the *Sunnyside*, 91 U. S., 208; the *E. A. Packer*, 140 U. S., 360; *Crocker* v. *Newton*, 18 How., 581, 583, and a long line of cases at Circuit, holding that the preferred vessel must slacken, change course, or stop, in face of obvious danger from keeping on, without saying so.

This principle has been repeatedly affirmed and reaffirmed in this Circuit.

In the *Santiago de Cuba*, 10 *Blatchford*, 444, that steamer had the *Brunette* on her starboard hand, and was held in fault for failing to keep out of the way. The *Brunette* was also in *fault for not stopping, in the face of evident risk* of collision.

Woodruff, Circuit Judge (at *p.* 455), said:

"Nor am I satisfied that the *Brunette*, in not slowing, stopping and backing, was not herself in like fault with the *Santiago de Cuba*. If, instead of porting her wheel, when she saw the danger, she had done this, and especially if, besides and before porting, she had slowed, stopped and reversed, it is greatly probable that no collision would have happened. True, under the general rule, she was entitled to keep her course, *but the time did come when she saw danger of collision, and when the rule, that 'every steamship, when approaching another ship, so as to involve risk of collision, shall slacken her speed, or, if necessary, stop and reverse,' became applicable to her, also.* She did see the danger. She did port, in order to escape. If, in due season, she had slowed, stopped and reversed, it is hardly possible that the two would have collided. A delay equivalent to a few seconds would have permitted the *Santiago de Cuba* to go clear. As already observed, these rules are not framed as the mere rule of obligation between the two colliding vessels. They are not based upon the idea that one may say to the other—you are in fault, and I will, therefore, do as I will. The interests of human life and the protection of property demand that, in circumstances of peril, the dictates of the highest prudence, and especially all just and peremptory rules of precaution, shall be observed by both, and their disregard shall bring both under

condemnation. Had the *Brunette* made even an ineffectual endeavor, it would have been credited to her; but, on the contrary, she rushed, without any effort to check her full speed, upon the destruction which she encountered."

In the *Titan*, 23 *Fed. Rep.*, 413, that vessel was proceeding up the North River, on a line with the westerly shore, having a car float on her starboard side, which obscured the green light. She, however, carried her range lights and towing lights, which were visible over the top of the float. *The Hills* was bound from the slip at the foot of Twenty-third street for Jersey City. Her pilot saw the white lights above the car float, but assumed erroneously that they were on a vessel bound down instead of up the river. She accordingly proceeded directly on her course until close upon the float, when *in extremis* she hard-ported, but did not stop or back. Both vessels were in fault.

Wallace, Circuit Judge (at p. 416), said:

"While ordinarily a vessel has a right to assume that another vessel is not derelict in the observance of the rules of navigation, *this presumption is not to be carried so far as to exonerate her from ordinary precautions on her own part or to excuse her from the consequences of a mistake, when by a slight exertion and without any peril to herself or to other vessels she could certainly avoid hazard.* There was ample room, plenty of time, and no intervening obstacles in the way of perfect safety if the *Hills* had slackened speed while she was passing the *Gould*. After this it was obvious that the *danger of collision with the Titan was imminent, and she should have been stopped and reversed.*"

In the *Catskill*, 38 *F. R.*, 367, the steamer, while coming down the North River and approaching her wharf in New York City, was run into by the ferryboat *Baltimore*, bound from New York across the river. The course of the *Catskill* lay direct for her pier, which took her directly across the bows of the *Baltimore*, which was nearing her slip in New York on her trip from Jersey City. The

intention on the part of the *Catskill* to keep her course was manifested by her disregarding the repeated signals of the *Baltimore*. The *Baltimore* did not reverse until within 200 feet of the place of collision. Both vessels having been found in fault in the District Court (34 *Fed. Rep.*, 660), the *Baltimore* appealed. Held, that the *Baltimore* was in fault, although she had the right of way.

Lacombe, Circuit Judge (*p.* 368), said:

"The District Judge has found that the course of the *Catskill* was plain, nearing the shore generally on a direct line from her position when first sighted to her wharf, and also on conflicting evidence that the *Baltimore* did not reverse until within 200 feet of the place of collision. Under such a state of facts, the *Baltimore* was clearly in fault. Her navigator was not surprised by any sudden indication that another craft, which he supposed intended to obey the rules, meant to violate them. On the contrary, with a very plain intimation that the other vessel was willfully or heedlessly continuing on a course, which made collision imminent, he kept on, in the hope that she would at the last moment discover her error and seek to rectify it. For thus keeping on until the safety limit was reached and past, the District Judge held the navigator of the *Baltimore* in fault and his decision is affirmed."

It is thus apparent that the Circuit Judges felt bound by the *Brittania* and *Breakwater* cases, for their decision overrules the decisions of two of the members of the Court in the *Titan* and *Catskill* (*supra*), which are not distinguishable in principle or on the facts from the case at bar.

The decision virtually overrules a long line of decisions by Judge Brown in the Southern District of New York, and many decisions in other districts holding the preferred vessel in fault for failing to slacken speed or stop, in face of obvious risk of collision caused by the other vessel wrongfully or heedlessly persisting in an improper course, are:

The *Aurania*, 29 Fed. Rep., 98.
The *John S. Darcy*, 29 Fed. Rep., 644.
The *Fanwood*, 28 Fed. Rep., 373.

The *Fred. W. Chase*, 31 Fed. Rep., 91.
The *Greenpoint*, 31 Fed. Rep., 231.
Wells vs. *Armstrong*, 29 Fed. Rep., 216, 218.
The *Margaret J. Sanford*, 30 Fed. Rep., 714.
The *Rockaway*, 38 Fed. Rep., 856
The *Rio Grande*, 38 Fed. Rep., 849.
The *Leonard Richards*, 38 Fed. Rep., 767.
The *America*, 32 Fed. Rep., 845.
The *Baltimore*, 56 Fed. Rep., 127.
The *Stone*, 49 Fed. Rep., 475.
The *Don Juan*, 50 Fed. Rep., 618.
The *Jackson*, 58 Fed. Rep., 607.

Marsden, Collisions, pp. 434, 435, says:

"Apart from the regulations, it would be negligence if a steamship having the opportunity to do so, failed to stop and reverse, if necessary (The *Birkenhead*, 3 W. Rob., 75; The *James Watt*, 2 W. Rob., 270); and article 18th appears to be little more than a declaration of the law in this respect (see per Lord *Halsbury* in the *Celo*, 14 App. Cas., 670, 673; per Lord *Bramwell*, *Ib.*, 689)."

The grounds upon which the Circuit Court of Appeals held the *Talisman* blameless for failing to slacken or stop were:

(1.) She had a right to suppose the *Delaware* would see and correct her error in navigation and manoeuver to pass under the stern of the pilot boat, and

(2.) When she finally saw the *Delaware* did not intend so to navigate, there was not time or room enough for her to stop or to make any manoeuver, and that accordingly her failure to attempt to stop or port was a fault *in extremis*.

As to the first of these grounds, it is argued in every starboard hand collision case where the pre-

ferred vessel is charged with failing to observe Article 18, that it was expected the other vessel would see and correct her error.

The important facts in this case are that nobody on the *Driggs* or on the *Talisman saw* the slightest indication that the *Delaware* was porting or was intending to port at any time before the collision; that on the contrary, when the vessel had approached within an eighth or a quarter of a mile, the *Talisman* blew a single blast signal to her, and her master was moved to do that because he saw that the *Delaware* was *not* porting or apparently intending to port, and he no doubt meant his single whistle to be understood by the other vessel as a signal under the Inspectors' Rules, indicating that he wanted to pass ahead, but when he got no answer to it, the Inspectors' Rules also would have required him to stop; that the pilots on the *Driggs* saw the steamer did not intend to port, and accordingly ported their helm and got out their lifeboat when the other vessel was at least an eighth of a mile away, and their porting saved them from collision. There was, therefore, nothing in the situation or approach of the vessels which justified a supposition that the *Delaware* intended to do anything else than she was doing, namely, keeping on with the apparent purpose of crossing ahead of the *Talisman*.

In the *John S. D'Arcy*, 29 Fed. Rep., 644, 648, this argument was advanced on the part of the preferred vessel, and Judge *Brown*, in holding her in fault for failing to observe Article 18, said:

"If the ferryboat [preferred vessel] had a right to expect that the tug would go out into the stream, *the fact that the tug was taking the contrary course was apparent, and it was clear that she was persisting in this course when she could no longer avoid the ferryboat by any change that she could make*, while the ferryboat could still, by stopping in time, avoid collision. The proof shows that the *Darcy*, at her moderate speed, would have stopped dead in the water in going a little over two lengths. The

considerable time that elapsed after the *Darcy's* first whistle leaves no doubt in my mind that the *Darcy* might have stopped completely after immediate danger of collision was manifest. *She was not justified in running upon the tug because the tug did not perform her duty; she should have stopped in time, under old Rule* 21."

These observations have singular application to the case in hand.

Article 18 was inserted in the statutes as a cumulative precaution against collision. Its presence in the rules apparently contemplates the case that a vessel bound to keep out of the way may, from poor lookout or from improper navigation, fail to make the maneuvers necessary to do so. Then, and in that case, the other vessel observing that needful precautions are not being taken by the vessel which should keep out of the way, is herself required to take precautions, namely, to slacken speed or stop and reverse if necessary, and in many cases, as in the present, lives and valuable property may be lost if the preferred vessel, seeing that the other is being navigated improperly, fails to adopt the cumulative precautions required of her by the statute. To say that in such a case the fault of the preferred vessel is a fault *in extremis*, for which she shall not respond, is virtually to abrogate Article 18, since the extremity of the preferred vessel is due to her previous fault in failing to slacken when the risk of collision became plainly involved. That such is the purport and design of Article 18 was pointed out by Judge Brown in the *Aurania*, 29 Fed. Rep., 28, 123, as follows:

"But whichever of these causes precipitated the collision, it must be held to have been imprudent, rash and blamable navigation that suffered two vessels of such size, going through the water at a speed of about 15 and 16¼ statute miles respectively, upon courses converging about one point, to come within 250 or 300 feet of each other, without any material effort by either up to that time to keep away. If they were converging by one point only, they were

'approaching' each other sideways at the rate of about 200 feet per minute; and as I find that the *Aurania* was gaining on the *Republic* not more than from 125 to 150 feet per minute, and had to gain from 150 to 200 feet in order to clear her, I do not regard it as altogether certain, notwithstanding the opinions expressed by the *Aurania's* witnesses, that the vessels would not have collided, even if their previous courses had been perfectly preserved. Such proximity, under great speed for such large vessels, very plainly, in my judgment, involved 'risk of collision,' within the meaning of the rules. '*Risk of collision*' *means, not merely certainty of collision, if no efforts be made to avert it, but danger of collision; and there is danger or risk of collision whenever it is not clearly safe to go on* (*The John McIntyre*, 9 Prob. Div., 135). The distinction between the risk and the certainty of collision is fully commented on by Brett, *L. J.*, in the case of *The Beryl*, 9 Prob. Div. 137, where it was held that *the rules required efforts to avoid, not merely the certainty of collision, but the risk of it; and that the obligation of the ship that had the right of way to slacken or stop in order to avoid collision, arose with the risk of collision, and not merely when it would otherwise be certain.* Still more elaborately was the same point ruled and decided by the House of Lords in the case of *The Khedive*, 5 App. Cas., 876.

"In my judgment, there was risk of collision, within the meaning of the rules, some time before these vessels had come within 300 feet of each other, and at least two minutes before the collision, by reason of their converging courses, their great speed, and their great bulk, which prevented rapid handling. * * * *Having the right of way does not dispense with the seventeenth rule, nor supersede the obligation to stop, where actual risk of collision is impending.* This is settled by the English decisions last cited, and by many decisions of the courts of this country."

The conclusion is that the *Talisman* was in fault for failing to comply with Article 18, and that the Circuit Court of Appeals erred in failing so to hold.

II.

The Court erred in refusing to hold that the *Talisman* was in fault for obstinately persisting on her course, contrary to the provisions of Articles 23 and 24 of the Regulations, in face of immediate danger of collision.

Those articles provide as follows:

ART. 23. In obeying and construing these rules, due regard shall be had to *all dangers of navigation*, and to *any special circumstances* which may render a *departure* from the above rules necessary, in order *to avoid immediate danger*.

ART. 24. Nothing in these rules shall exonerate any ship or the owner or master or crew thereof from the consequences of any neglect to carry lights or signals, or of any neglect to keep a proper lookout, or of the neglect of any precaution which may be required by the ordinary practice of seamen or by the special circumstances of the case.

Those on the *Talisman* knew that the *Delaware* was intending to come in between the outer buoys of Gedney Channel (*fols.* 112, 113).

Only a short time before the collision she was thought to be heading for the red can buoy (*fol.* 159), which is the outer buoy on the north side. They knew the tide was flood and would have a tendency to bear the *Delaware* to the northward (*fols.* 619, 579). They kney that *being head to the tide* there would be no danger in their stopping. They knew the *Delaware* was emerging from thick weather, and that it was threatening to be thick again, and must have supposed that the vessel would naturally wish to navigate up by the line of the buoys. They could have seen, had they looked, that when she neared the Channel, she would be very close to the red can buoy, and might have appreciated the danger (which troubled the pilot) that she would foul the chain of the red can buoy with her propeller, if she attempted to port.

More than that, they *saw her steadily proceeding upon a course substantially at right angles with their own, and if they had looked they must have seen that the relative bearing of the Delaware from the Talisman did not change.* She was always 5 points on the port bow (see diagrams). They knew their speed was about 5 knots and they supposed that of the *Delaware* was about 10.

Above all, the risk of collision was apparent, or should have been, when the vessels were at least an eighth of a mile apart, if not before. The engineer of the *Talisman* at the time her second whistle was blown, when her captain says the *Delaware* was still a quarter of a mile off (*fol.* 162), was sure there was going to be a collision, and those on board the pilot boat realized it at the same time, hard ported their helm and got their lifeboat ready (*fols.* 87, 292, 325). The danger at this time is acknowledged in the libel (*fols.* 14, 15). Still Capt. Winnett obstinately refused to see the risk or to mind it, and heedlessly persisted on his course. In so doing, he ignored a most evident danger of navigation, failed to follow the ordinary practice of seamen of slackening speed or stopping in face of such risk and wholly ignored his duty to slacken or stop to avoid immediate danger, as required by the 23d and 24th Articles.

It has been distinctly held in the Supreme Court that obvious danger of collision presents a case of special circumstances requiring the preferred vessel to slacken speed or stop, and the same principle has been affirmed in the House of Lords.

In the *Sunnyside*, 91 *U. S.*, 208, a sailing vessel was condemned for strictly adhering to the rule and running down a steamtug which lay motionless upon the water, although the latter was conceded to be in fault for not getting out of her way. Mr. Justice *Clifford* said:

"Negligence more manifest, culpable or indefensible, in view of the circumstances, is seldom ex-

hibited in controversies of this character, and the only excuse offered for it is that the 18th sailing rule provides that where one of two ships is required to keep out of the way, the other shall keep her course, entirely overlooking the fact that the mandate of that rule is declared by the rule itself to be subject to the qualifications of Rule 24" (same as International Art. 23).

Further along in the opinion he says:

"We prefer to rest the decision upon the ground that it was the duty of the bark, *in view of the special circumstances*, to have put up her helm and have gone to the right, or to have put it down and suffered the steamtug to move past in safety.

"Cases arise in navigation where a stubborn adherence to a general rule is a culpable fault, for the reason that every navigator ought to know that rules of navigation are ordained not to promote collisions, but to save life and property by preventing such disaster. * * * *No vessel is justified by pertinacious adherence to a rule for getting into collision with a ship which she might have avoided* (1 *Parsons Shipping and Admiralty*, 580). * * *

"Sailing vessels on the larboard tack and close hauled are in general required to keep their course, but Dr. Lushington holds that such a vessel is not justified in pertinaciously keeping her course, even though the vessel she meets is on the starboard tack with the wind free. 'Where practicable,' said that learned Judge, 'such a vessel is bound to take the necessary precautions in avoiding the collision, although the other vessel is acting wrongfully in not giving way in time,' and in that case he held that both vessels were in fault (The *Commerce*, 3 W. Rob., 287)."

In the *E. A. Packer*, 140 U. S., 360, Mr. Justice *Brown*, delivering the unanimous opinion of the Court, laid down the law governing the preferred vessel in a crossing case as follows:

"Whether the *Packer* was guilty of fault in starboarding or not, the duty of the *Wolverton* (preferred vessel) was clear. She was bound (1) to keep her course, and (2) to *check her speed, if there was apparent risk* of collision, and *if necessary to avoid immediate danger*, to *stop*."

Further along in his opinion he says:

"If the officer in charge were satisfied that the signals of the *Packer*, and her apparent starboarding, were an error and involved a risk of collision, it was his duty, under Rule 21, to slacken speed before crossing her bows, or if necessary, to stop or even to reverse, if it could be done without danger to tow. This rule was applied by the House of Lords to a collision between crossing vessels in the recent case of the *Memnon*, 6 App. Mar. Cas., 317, wherein it was declared to be the *duty of the vessel entitled to keep her course to comply with the rule as to slackening speed, or stopping and reversing, if necessary*, and if she does not do so, the burden is upon her to show that to continue her speed was in fact the best and most seamanlike maneuver under the circumstances."

And in the *Britannia*, 153 U. S., 130, 142, Mr. Justice *Shiras* said:

"It is not meant that some exigency or *obvious danger* might not justify her in checking her speed or even stopping altogether, but such a case is provided for in the Twenty-fourth rule. As we have seen, no exigency is found to have existed in the present case."

In *Crocket* vs. *Newton*, 18 How., 581, 585, Mr. Justice *Curtis*, in stating the rule for a sailing vessel meeting a steamer to keep her course, added:

"This rule should not be observed *when the circumstances are such* that it is apparent its observance must occasion a collision."

In *Wilson* v. *Canada Shipping Co.*, 2 App. Cas., 389, the Privy Council held that obvious risk of collision made a case of particular circumstances, which required a preferred vessel to depart from the regulation requiring her to keep her course.

Sir *Robert Phillimore*, delivering the opinion of the Court (at p. 393) stated it was

"perfectly clear that though the port-tacked vessel is to get out of the way of the starboard-tacked vessel, and the starboard-tacked vessel is to keep her course, *that rule of navigation does not mean,*

and never has been construed to mean, that the starboard-tacked vessel is to obstinately continue on her course, when she sees that in the particular circumstances, by a variation from it, she can avoid a collision. Their lordships, after consulting with their Nautical Assessors, are of opinion * * * that the *Underwriter* (preferred vessel) ought to have * * * put her helm down at an earlier period than she did, that is, at the moment when the hailing first reached her, which it is clear she did not do, and which, if she had done, would have avoided the collision. She would have brought her head to the wind and there would have been no collision."

And for the omission of the preferred vessel to make this maneuver, in view of the obvious risk of collision, she was held in fault.

In the *Tasmania*, 15 App. Cas., 223, 225, Lord *Herschell*, commenting upon the duty of the preferred vessel, in the face of immediate danger, to refrain from persisting on her course (p. 225), said:

"Although having regard to the relative position of the two vessels, it was the duty of the *Tasmania* to keep her course; it is clear that she would not be justified in blindly proceeding in that course, if it was manifest that disaster must result from it. It is provided by Rule 23 that in obeying and construing the rules *due regard should be had to any special circumstances which may render the departure from them necessary in order to avoid immediate danger. As soon, then, as it was, or ought, to a master of reasonable skill and prudence, to have been obvious that to keep her course would involve immediate danger, it was no longer the duty of the master of the Tasmania to adhere to the 22d rule. He was not only justified in departing from it, but bound to do so,* and to exercise his best judgment, and avoid the danger which threatened."

In the present case the danger of collision was as obvious as in any of the foregoing; the excuses here alleged are the same that in those cases were overruled. But for the pertinacious insistance by Captain Winnett in what he conceived to be his right, the even tardy efforts of the *Delaware* to avoid collision

would have succeeded. The willful exercise of the right in this case was a wrong, contributing directly to the collision, for which the *Talisman* should be deemed in fault.

III.

The Court erred in refusing to hold that the *Talisman* was in fault for omitting to port her helm or to go astern in accordance with her whistle signals.

The collision occurred about three miles outside Sandy Hook within coast waters, where the revised International Regulations are in force.

Singlehurst v. *La Compagnie Générale Transatlantique*, 11 U. S. App., 693.

Article 19, of the International Regulations, is as follows:

In taking any course authorized or required by these regulations, a steamship under way may indicate that course to any other ship which she has in sight by the following signals on her steam whistle:

One short blast to mean: "I am directing my course to starboard."

Two short blasts to mean: "I am directing my course to port."

Three short blasts to mean: "I am going full speed astern."

The use of these signals is optional, *but if they are used, the course of the ship must be in accordance with the signals made.*

During the five minutes last preceding the collision, the *Talisman* blew two single blasts upon her whistle at intervals, and immediately before the collision, blew three short blasts, but "the course of the ship" was not "in accordance with the signals made."

When the *Talisman* was an eighth of a mile to the northward of the northerly line of the buoys of Gedney Channel, and after having shaped her course S. S. E. for the black can buoy, the *Delaware* being then headed about W.$\frac{1}{2}$S. for the mouth of the channel, and judged to be a mile and a quarter off, Captain Winnett blew a single blast upon his whistle (*Winnett, fols.* 159, 157, 132, 130, 131).

Just as he was coming to the Channel he blew a second single blast (*Winnett, fols.* 134, 164). The *Delaware* was then *one-fourth of a mile off* (*Winnett,* 136).

The course of the *Talisman* was not changed after either of those signals; she was kept right on (*Winnett, fols.* 134, 137).

When the steamer was an eighth of a mile off Winnett blew *three* short blasts on his whistle (*fols.* 550, 137, 138), but made no change of speed.

As the engines of the *Delaware* had been going full speed astern from 10.3 until 10.4 (*fols.* 254, 244), and as she stops from full speed (10 knots) to a standstill in 1 minute and 55 seconds (*fols.* 200, 201), and as both captains admit, the *Delaware* was at a full stop within a little more than her length from the place of the collision (*Thomas, fol.* 199; *Winnett,* 169), it is evident that if the *Talisman* had ported her helm or reversed in accordance with her whistles the collision could not have occurred, as she would have crossed the *Delaware's* course ahead of the point at which the *Delaware* stopped or stopped before she reached it.

The language of the rule is imperative:

"The use of these signals is optional, *but if they are used, the course of the ship must be in accordance with the signals made.*"

The failure of the *Talisman* to alter her course, in accordance with the signals, was a plain infraction of the rule, for which she should be held in fault.

In *Singlehurst* v. *La Compagnie Générale Transatlantique*, 11 U. S. App., 693, the vessels were crossing in the lower bay, *La Champagne* being outward bound by way of the Main Ship Channel, upon a course E. by N. $\frac{1}{4}$ N., the *Lisbonense* being inward bound *via* South Channel, on a course about NW. $\frac{3}{4}$ N. The *Lisbonense* (preferred vessel) blew a single blast upon her whistle, but did not change her course to starboard, her pilot apparently understanding that he was navigating under the supervising inspectors' rules, and that his one blast simply meant that he was to pass ahead of *La Champagne* (p. 703).

Collision having occurred, the *Lisbonense* was held in fault for failing to make the maneuver indicated by her whistle, the omission having resulted in her failure to reach the course of *La Champagne* as far ahead of that vessel as by her own signal, under Article 19, she had engaged to do.

Lacombe, Circuit Judge (p. 704) said:

"Having given the one blast signal, however, the *Lisbonense* was bound by Article 19 to direct her course to starboard, and her failure substantially to make such change was a fault contributing to the collision, because by not so navigating, she failed to reach the course of the other vessel as far ahead of her as by her own signals she engaged to do; although neither pilot at the time understood he was navigating under the International regulations, or bound to make the change of course required upon giving the signals prescribed by Article 19; had she substantially so changed her course the collision would not have happened."

See the decision of Judge Brown in the same case upon this point.

47 Fed. Rep., 122, 125.

The omission to port in accordance with the signal was an infraction of a statutory requirement, which places the burden upon the *Talisman*, to show that the omission could not possibly have contributed to the collision. She has not done so.

The *Pennsylvania*, 19 Wall., 125.
The *Bolivia*, 1 U. S. App., 26.
The *Duke of Buccleugh*, 1891 A. C., 310.

IV.

The points involved are of sufficient gravity and importance to warrant the Court in issuing the writ as prayed.

Apart from the importance of the principles involved to commerce and navigation generally, the amount involved exceeding, with interest, the sum of $23,000, fairly entitles the owners of the steamship to a fuller and more deliberate consideration of their cause than was given in the Circuit Court of Appeals, where the decision was announced at the conclusion of the argument, without taking the usual time for consideration and for examination of the record and the questions of law presented for determination.

It may be that the Court considered the question of merits unimportant, as it was apparently of opinion that the defense pleaded by the *Delaware*, under the 3rd Section of the act of Congress entitled "An Act relating to Navigation," approved February 13, 1893, which provides that where the owner of a vessel has used all due diligence to have her properly manned, outfitted and supplied, "neither the vessel, her owner or owners, agent or charterers shall become or be held responsible for damage or loss resulting from faults or errors in navigation or in the management of said vessel," relieved the *Delaware* from responsibility; but as the questions arising upon that branch of the case have been certified to the Supreme Court of the United States, the question of the merits would become of the extremest importance if this Court should find, as the District Judge apparently thought, that the statute had no application to cases of collision between vessels, but only to cases between a vessel and her own cargo.

As a portion of the case has been sent to this Court for its determination, and as no greater delay

will ensue by having the whole record brought up, and the entire case considered and passed upon in this Court, the petitioner being willing to submit the question of the merits upon briefs, as well as the questions arising upon the certificate, and, at the same time, and as the Court will be in better position to pass upon the certified questions by having the whole record, which is brief, before it, it is respectfully submitted that the case is fairly one in which the Court should exercise the jurisdiction conferred upon it by the 6th section of the act approved March 3, 1891, which provides that where questions and propositions are certified to this Court by a circuit court of appeals, the Court may answer the questions so certified, "or it may require that the whole record and cause may be sent up to it for its consideration, and thereupon shall decide the whole matter in controversy, in the same manner as if it had been brought there for review by a writ of error or appeal."

V.

The prayer of the petitioner for the issuance of the writ of *certiorari* should be granted.

March 23, 1895.

Respectfully submitted,

CONVERS & KIRLIN,
Proctors for Petitioner.

J. PARKER KIRLIN,
Of Counsel.

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MAY 20 1895
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CLERK.

Supreme Court of the United States.

OCTOBER TERM, 1894.

CHARLES H. WINNETT and others,
Libellants and Appellees,
AGAINST
The Steamship "DELAWARE,"
THOMAS THOMAS,
Claimant and Appellant.

No. ~~968~~ 570

MOTION FOR ADVANCEMENT OF CAUSE.

To the Honorable the Justices of the Supreme Court of the United States:

The petition of Charles H. Winnett and others, libellants and appellees, respectfully shows:

The cause originally came before this Court upon a request for instructions from the Honorable the Judges of the United States Circuit Court of Appeals for the Second Circuit, said request having been filed in the office of the Clerk of the Court on the thirteenth day of March, 1895, and that cause having been duly docketed and numbered as 941.

The said request for instructions was made after hearing an appeal taken by the claimant from a decree in admiralty of the District Court of the United States for the Eastern

District of New York, upon which appeal it appeared that the steamship *Delaware*, while in charge of a duly licensed pilot, had run into and sunk the tugboat *Talisman*.

The collision having been caused by the negligent navigation of the *Delaware*, it was nevertheless claimed that neither the said steamship nor her owners were liable therefor by reason of Section 3 of an act of Congress of the United States, entitled "An Act relating to Navigation of Vessels, Bills of Lading, and to certain obligations, duties and rights in connection with the Carriage of Property," approved February 13, 1893 (being 27 Statutes at Large, 2d Section, Chap. 105).

In support of said defense, it was shown that the Anglo-American Oil Company, a corporation of Great Britain, was the owner of the steamship *Delaware*, and that due diligence had been exercised by the said company to make said steamship in all respects seaworthy and properly manned, equipped and supplied, within the provisions of Section 3 of said act.

After stating the facts, the learned Judges of said Circuit Court of Appeals requested the instructions of this Court upon the following questions of law, namely:

1. Whether the provisions of the third section of said act of Congress exonerate a merchant vessel from loss or damage to another vessel by collision resulting from faults in navigation, provided the owner of such merchant vessel has exercised the diligence required by the said section.

2. Whether said act exonerates a vessel which at the time is in ballast and not transporting merchandise or cargo.

3. Whether said act is to be construed to relieve the owner of a British vessel from liability for collision in American waters when in charge of a duly licensed Sandy Hook pilot, taken as required by law.

4. Whether said act is to be construed to relieve a vessel or its owners from liability to those on another vessel who may sustain personal injuries arising from negligent collision.

5. Whether, upon the above statement of facts, the steamship *Delaware* is exonerated for her collision with

the tug *Talisman* and for the damages to person and property resulting therefrom.

The petitioners applied to this Court on March 25, 1895, to have said cause advanced for hearing, which application was thereupon granted. However, the appellant at the same time submitted a petition for *certiorari* to bring up the whole record, which was also granted on April 1st, and it was then ordered that the two causes (that on certificate and the whole record) be consolidated as No. 959.

The same reasons upon which the Court advanced the original cause still apply, as the hearing will necessarily involve the construction of an act of Congress which has never been before this Court, and is claimed to apply to all collisions occurring on our own waters and on the high seas. If it is construed as urged by the claimant and appellant it will relieve shipowners of all liability for collisions.

The questions involved are of great importance to commerce and shipping, and it is highly desirable that there should be an early decision by this Court, in order that shipowners and all persons employing vessels may know whether the maritime law as it has existed from the earliest times is still in force, or whether the phraseology of this act of Congress has taken away the remedies at law and in the admiralty for collision at sea, leaving steamships to sink and destroy other vessels without resulting liability *in rem*, or responsibility by the owners.

Your petitioners therefore respectfully pray that the cause be advanced and set down for hearing at as early a day as the convenience of the Court will admit, and they will ever pray, &c.

NEW YORK, May 15th, 1895.

CHARLES H. WINNETT and others.

Harrington Putnam

Of Counsel.

Supreme Court, U. S.
JAN 4 1896
JAMES H. McKENNEY,
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1895

No. 570

The Steamship DELAWARE, her Engines, &c.,
THOMAS THOMAS
Claimant, Appellant

vs.

CHARLES H. WINNETT *et al*
Libelants, Appellees

On writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit

BRIEF FOR THE DELAWARE, APPELLANT

CONVERS & KIRLIN
Proctors for Appellant

J. PARKER KIRLIN
Of Counsel

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Supreme Court of the United States,

October Term, 1895. No. 376.

The Steamship "DELAWARE," THOMAS,
Claimant, Appellant,

AGAINST

CHARLES H. WINNETT and others,
Libelants, Appellees.

Brief for the "Delaware," Appellant.

This case comes before the Court on a *writ of certiorari* to the United States Circuit Court of Appeals, for the Second Circuit, issued out of this Court April 3, 1895 (Rec., p. 142), on petition of the appellant.

The libel was filed on the 20th of September, 1893, by Charles H. Winnett, John Flannery, E. L. C. Buyatti, Conrad Falkenberg, James Walle and Goss Lunngrund, the owner and crew of the tug *Talisman*, to recover damages sustained by the libelants in a collision between the *Talisman* and the steamship *Delaware*, which occurred at the entrance of Gedney's Channel, off Sandy Hook, September 16th, 1893.

In the District Court the *Delaware* was held solely to blame (p. 132) (61 Fed. Rep., 525), and a decree was entered August 7, 1894, for $21,318.70 (p. 133). The claimant thereupon appealed to the Circuit Court of Appeals. That court affirmed the decree, as to the fault of the steamship (p. 138), subject to the decision of this Court upon certain questions duly certified, which in effect

were, whether the steamship was absolved from liability for her fault, by the provisions of "An Act Relating to the Navigation of Vessels, Bills of Lading, and to Certain Obligations, Duties and Rights in Connection with the Carriage of Property," approved February 13, 1893; 27 Statutes at Large, Chapter 105 (Rec., p. 137).

The appellant thereupon applied for a writ to bring up the whole case, on the ground that the Circuit Court of Appeals erred in failing to hold that faults on the part of the *Talisman* contributed to the collision.

No opinion was filed in the Circuit Court of Appeals.

Statement of the Facts.

The evidence for the libelants consisted of the depositions of

WINNETT, the master of the *Talisman* (p. 22);
FLANNERY, engineer of the *Talisman* (p. 62);
LUNNGRUND, fireman of the *Talisman* (p. 6);
WALLE, deckhand of the *Talisman* (p. 8),
FALKENBERG, deckhand of the *Talisman* (p. 50);
BERRY, pilot in charge of the pilot-boat *Edmund Driggs, No. 7, of New York* (p. 14);
WAUGH, boatkeeper of the *Driggs* (p. 54).

Only Captain Winnett was examined in the presence of the Court.

The evidence for the *Delaware* consisted of the depositions of

HARPENAU, pilot of the *Delaware* (p. 114);
Captain THOMAS (p. 34);
DOWBIGGIN, second mate (p. 89);
CRACROFT, third mate (p. 72);
NEISH, chief engineer (p. 48);
UNDERWOOD, lookout (p. 94);
PEYTON, wheelman of the *Delaware* (p. 103);
COGGHILL, carpenter (p. 111);
ARCHIBALL BLAIR, marine superintendant for the owner of the *Delaware* (p. 128).

Only Captain Thomas was examined in the presence of the Court.

1.—*The Vessels.*—The *Delaware is* a steel tank steamer, of 2,495 tons register, 345 feet long, 44 feet in width, and belongs to the Delaware Steamship Company, an English corporation. She is regularly engaged in the oil trade between New York and London or Liverpool (pp. 34, 35).

She carried a full complement of officers and crew, consisting of 42, all told (p. 34), and on the morning in question was seaworthy, properly manned, officered and equipped, and was in charge of a New York pilot, who was on board directing her navigation (pp. 34, 35, 73, 114, 127).

Captain Thomas, the master of the *Delaware*, had been on the bridge with the pilot until about twenty minutes before the collision, when he went into the chart-room to arrange his port papers, preparatory to entering the harbor (pp. 37, 44, 45). He remained below until about one minute before the collision (p. 44, Log 50), when he came again upon the bridge, and seeing the *Talisman* about two points on the starboard bow, and close by (p. 37), gave orders to the engine-room and to the wheel, which, however, proved unavailing.

The *Talisman* was an ocean tug 100 feet in length (p. 22), owned by the libelant Winnett, and at the time of the collision was engaged in towing the pilot station boat *Edmund Driggs, No. 7, of New York*, on a hawser, from a point some distance to the northward of the northerly line of Gedney's Channel (p. 24) back to its station, which is outside the black fairway buoy on the lower (p. 126) side of Gedney's Channel.

The pilot boat *Driggs*, which was in tow, was about 75 or 80 feet long (Winnett, p. 34). The length of the hawser between the *Talisman* and the *Driggs* is variously stated.

Berry (p. 14) testified:

"Q. How much line did you have out? A. I suppose about 20 fathom; allowing 5 fathom to make fast, about 15 fathom apart."

Cracroft, third officer of the *Delaware*, testified (p. 75):

"Q. About what should you judge the length of it (tow line) to be? A. I should think it was somewhere about

20 fathoms; it might have been more, or it might have been less."

Libelant Falkenberg testified (p. 52):

"Q. How long a tow line did you have out? A. I don't know exactly.
Q. Was it 10 fathoms? A. It was more than that.
Q. How much? A. *I guess it was* 30; I don't know, sir."

Libelant Walle, on cross-examination, testified (p. 12):

"Q. Was the rope fast when you took hold of it (a moment before the collision)? A. Yes, sir.
Q. Was it taut? A. Yes, sir.
Q. How far off was the pilot-boat? A. About 60 fathoms from the tug.
Q. Wasn't it a good deal less than that? A. *It was a long towline; I suppose the towline was 60 fathoms.*
Q. I want to know how far the pilot-boat was away, not the length of the towline? A. *She was away the whole length of the line.*"

It is thus evident that the procession of the *Talisman* the hawser and the *Driggs* was somewhere between 300 and 540 feet, and in crossing the channel would occupy a half or a third of its width.

2. *The Weather.*—During the morning of the collision the weather was cloudy and overcast until the *Delaware* got within three or four miles of the bar (outer end of Gedney's Channel), when a heavy rain squall came on, which lasted until she was within about a mile of Gedney's Channel (Harpenau, 572, 573)—a period of probably 10 minutes, during which the vessels were lost to view. About four or five minutes before the collision, and when the vessels were probably a mile or more apart, the rain squall passed over, and each vessel sighted the other and kept her in sight from that time until the collision (pp. 24 (log. 50), 74, 88, 96, 114, 115, 116, 58).

3. *Tide.*—At the time of the collision the tide was flood, setting somewhat to the westward of north (p. 77), so that the *Talisman*, which was proceeding southeast by south

or south-southeast (Berry, 15), was head to the tide (Harpeneau, 119, 116-117, 146). High water at Sandy Hook was predicted at 11.48 A. M. (Tide Tables, p. 128).

4. *Previous Course of the Delaware.*—Before the rain squall came on, the *Delaware's* pilot sighted the outer buoys of Gedney's Channel and found the ship was heading right for them (p. 115). An outward bound oil tank steamer was seen coming down the channel at that time, and the tugboat was seen leaving the tank and going northward towards the station boat (p. 115) which the *Delaware's* pilot had sighted lying at anchor to the northward of Gedney's Channel with her mainsail up and peak dipped (p. 115). About the time the squall came on, the *Delaware's* wheel was ported about a half point, so as to make sure not to come near the outgoing tank steamer in the rain (p. 115), and when the squall passed over, so that the pilot was able to make out the outer buoys of Gedney's Channel again, the red fairway buoy (northerly side) was bearing about half a point on the steamer's bow port (p. 115). The steamer was then on a compass course west ½ south (pp. 115, 123). The pilot thereupon starboarded one point to bring the buoy on the starboard bow, which brought the course to W. by S ½ S. (compass) (p. 123, original p. 155), or allowing for a half point westerly variation (p. 123) to a true course west by south.*

He steadied on the W. by S. course with the red can buoy about a half point on the starboard bow (p. 116), and continued on it without change (p. 123) until the captain came on the bridge, when the ship was a couple of ship's lengths off from the place of collision (p. 38), and ordered the engines stopped and reversed (37, 38, 48), and the helm hard astarboard (p. 37, 38; see also pp. 25, 30, 64, 122).

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* The pilot (top of p. 123) puts the corrected course W. by S. ½ S., after allowing for the half point westerly variation, but this is an error of arithmetic, as the compass course before he changed a point was west ½ south, and the southerly change of a point would make it west by south ½ south by the compass, and allowing a half point for westerly variarion, would bring the true course to west by south, as he explains farther down the page at top of original page 155.

Examined as to the time these orders were given, Harpenau (p. 122) said:

"Q. How far off do you think the tugboat was at the time the wheel was put hard astarboard? A. By the time we stopped, and going back full speed, and the helm hard astarboard, about a ship's length."

Thomas (p. 38):

"Q. How far off was the *Talisman*, do you think, when you gave those orders, how many of your ship's lengths? A. About couple of ship's lengths; might been little more or less; about couple of ship's length, I should judge." (Same effect, p. 49.)

Captain Thomas went on the bridge and gave the orders quoted about one minute before the collision (pp. 38, 44; log, 50, 76, 106).

The entry of log reads:

"10.03. Captain Thomas rushed on bridge and immediately put engines full speed astern and hard astarboard the helm.

10.04. Struck tug *Talisman* amidships, she sinking in about 2 minutes" (p. 50).

Those on the *Talisman* and *Driggs* saw the steamer's heading and course right after the squall, and noted both correctly (Winnett, p. 30; Berry, p. 21).

The reverse action of the engines being to turn the ship's head in the opposite direction from that in which she would turn if the screw were going ahead, and this influence being aided by the flood tide striking her port bow, it is probable that the ship's head did not change materially under the starboard helm while she traversed the six or seven hundred feet to the place of collision, or that, if it turned at all, it turned to starboard rather than to port.*

Harpenau, pilot of the *Delaware*, was cross-examined as to this, and testified (p. 123):

"Wnen you ordered helm hard a starboard, did your steamer, the *Delaware*, swing off in answer to her helm?

* The evidence as to this and citation of authorities where the effect of reversed engines on an altered helm has been noticed will be found *post*, p. 37–39.

A. *I don't think she did.* I couldn't say; I wasn't watching the compass."

At page 118 he said: "When we got our ship stopped and going back on her, *our head swung to starboard.*"

Thomas, page 38:

"We stopped after she had gone her own length after the collision. She was still heading the same way almost."

It may safely be assumed that the course of the *Delaware* for three or four minutes before the collision, and up to the time of the impact of the vessels, was substantially W. by S.

The reason the pilot of the *Delaware* did not port his helm was, that he was maneuvering to pass to the southward of the red fairway buoy, and he feared that if he ported, the flood tide would carry the steamer to the northward and bring him so close that his propeller would foul the buoy chain (pp. 116, 117); and by the time he reached a point where he could port and still pass the buoy in safety, he was so close in, and there was such little time for his vessel to swing, that he could not use the port helm without coming into collision with the pilot-boat (pp. 59, 117, 31, 32, 119). Therefore, the only maneuver that occurred to him was, to stop and reverse, which he was doing when the master came on the bridge, but too late (pp. 38, 117).

The pilot desired to enter the channel, so as to navigate in by the buoys, as the weather was again getting thick (p. 119).

5. *What Harpenau expected the Talisman to do.*

At page 119 he testifies:

"Q. What did you expect the *Talisman* to do under the circumstances as you saw them? A. I expected he would stop and slow up.

Q. What made you think that? A. The way I was heading and the way he was on my starboard bow, I had no chance to port without running a chance of colliding

with the pilot-boat going faster, the tugboat was drawing in more broad on my beam. For that reason I expected he would stop. There was no possibility of my clearing the boat after I got past clear from the buoy."

At page 122 he says:

"Q. Did you have any other talk with the captain at the time he came up on the bridge? A. The remark I made was, when the captain came up and asked me, 'Pilot, what are you trying to do?' I told him, 'What can I do? We can't port and go under that boat's stern.' I says: 'We can't starboard neither; we will be showing our broadside to him. The only thing is for him to stop and slow up; and let us go past.' I said to the captain: 'Surely, the man will stop and slow up and let us go by.'

Q. Did you say to the captain that you could not starboard? A. No, we could not then to avoid a collision."

At page 128 he further says:

"Q. You say you said to the captain, 'Surely he will stop and let us go ahead.' What made you think that? A. We expect little courtesies that way.

Q. What do you mean by that? A. Quite often they do. Quite often they give us the right of way; even if we have not the proper right to it they will.

Q. Who does that? A. There is quite a number of tugboat men that I know of. It was the only way I could see to avoid a collision, for him to stop."

At page 127 he said:

"Q. You know that when the courses of vessels are crossing, and you have the other vessel on the starboard hand, it is your duty to keep out of the way, don't you?

A. Certainly; but circumstances alter cases.

Q. And the circumstances in this case was that you thought that she would get out of the way; is that it?

A. No; I had the buoy right under my bow. I couldn't stop my ship without running in danger of damaging my propeller and disabling my ship."

There was nothing to prevent the *Talisman* slackening or stopping (pp. 119, 70).

6. *Touching the Delaware's ability to pass under the pilot-boat's stern in the channel.*

Waug, at page 57, said:

"How much room do you think there was between the stern of your pilot-boat and the red buoy at the time of the collision? A. There was room enough for a steamer to pass; there was no necessity for him keeping right in there (in the channel) because he was a light-draught steamer.

Q. Plenty of room to the north of the red buoy? A. If he wanted to, or if he didn't want to, he could stop the ship."

At page 16 Berry said:

"Q. Would there have been any difficulty for the steamer to have ported her wheel and gone under the stern of the tug and tow? A. She could have gone around the buoys anywhere within a half a mile."

These answers in their evasions tend to show there was no room *between the pilot-boat's stern and the buoys* for the *Delaware* to pass in there, and thus support the testimony of Harpenau and Captain Thomas.

At page 17, however, Berry says there was room enough between the stern of the pilot-boat and the northerly buoys for the steamer to pass, but he does not say, nor does Waug, the boat-keeper, nor indeed does Captain Winnett himself, that there was room enough between the pilot-boat's stern and the buoys for the steamer to pass up *after rounding* the the red fairway buoy.

All this testimony really amounts to is, that the pilot-boat was far enough into the channel, so that *if the steamer had been straightened up*, or had been approaching the channel head on, there would have been room for her to have passed between the pilot-boat and the red buoys.

Captain Winnett, when asked a very leading question by Judge BENEDICT on this subject, said (p. 31):

"By the Court: Q. If she had not swung (meaning *to port*), you think she would have cleared the stern of the pilot-boat? A. That is only an opinion. I did not dream

there was going to be a collision; *I supposed she was going up between the two of us until the last minute.* I wanted to cut the line away. How she could swing up and hit my vessel, I have never been able to find out" (same effect, p. 32).

The testimony of the pilot and master of the *Delaware* was emphatic that they could not clear the pilot-boat by porting and going under the stern.

At pages 116, 117 Harpenau said:

"When I did hear the whistle and see the tugboat, I intended to give one whistle, but I had this buoy right close under my starboard bow, and being flood tide, I couldn't port, the tide would sweep me on top of it, and I couldn't starboard either; altering the helm would have sent me more closer to the buoy, and I was that close to it that I had to let my ship go full speed, so as to get past the buoy without running any danger of picking it up in the propeller.

Q. Could the other vessel, if they had looked, have seen your position with regard to this buoy at that time? A. They could.

Q. What did you do then? A. The position of the boat to me looked that there was no trouble to me to go across the course he was going, with the course I was steering, and for that reason I didn't answer the whistle. And about the time I got past the buoy, in position to use my helm, we had closed up so much that I couldn't use the port helm—by doing so I would have had to collide with the station boat, and to use my starboard helm would—I found out I couldn't, it would involve more risk of collision by bringing my broadside to his.

Q. What order did you then give, if any, on your ship? A. I see that a collision was imminent; I gave the order to stop and go back at full speed, to the captain" (to same effect pp. 119, 122).

Harpenau (p. 126) was asked on cross-examination how he would have passed a vessel coming down the channel.

"Q. Suppose just before the captain rushed on the bridge, when you were still near the first red buoy, and the French steamer, which you last saw rounding the Southwest Spit, had come out through the drizzling rain right down Gedney's Channel to sea, how would you have passed her? A.

I would have passed her; port my helm and go past her on her port side.

Q. The width of Gedney's Channel is such that steamers can meet and pass without any trouble, can't they? A. Yes; but I would rather say that would be according to how the ships were steering."

The design of this line of inquiry obviously was to attempt to show he might have ported to the *Driggs*. The answer, however, rather tends to support his evidence in chief. It indicates his understanding of his duty to keep to the north side in going up, if safe and practicable, but incidentally shows there must have been a good reason for his *not* trying to pass to the northward of the pilot-boat by porting; and the only reason there could be would be want of room.

Captain Thomas, on the same point said (p. 39):

"Q. Why didn't you port instead of starboarding when you came on the bridge?

A. We would run into the pilot-boat if we did."

This testimony of those in charge of the *Delaware's* navigation is entitled to greater weight than the qualified surmises of those on the other boats that the *Delaware* could have ported if she had wished to. There was no reason why she should not have wished to, except the danger incident to the attempt. In the face of that danger she could not go ahead at full speed and chance it under a port helm; and by stopping and porting, the swing of the vessel would have been so far retarded by the reverse action of the engines, as to make the attempt futile (see *post*, p. 37).

7. *Previous course of the Talisman.*

Both the position and the course of the *Talisman*, with the *Driggs* in tow, before the squall lifted, are ill-defined in the record. The master of the *Talisman* had not sighted the *Delaware* before the squall came on, but those on board the *Driggs* had sighted her a half hour or an hour before the collision (pp. 51, 53, 15, 56, 56, 114, 136), and

saw that she was making for the entrance of Gedney's Channel (pp 30, 21, 55). When the squall passed over, and Captain Winnett took his bearings, he found buoy G 2 about a quarter of a mile off, bearing "probably southeast by south from me. I mean from my bow, about southeast by south," and his tug was then heading for the black buoy (Winnett, p. 30).

At that time he first sighted the steamer and correctly judged her course and heading. He says (p. 30):

"Q. The steamer was heading for the channel? A. The steamer was headed about west ½ south, I should say; about for the red buoy, I should judge, she was heading."

Pilot Berry, of the *Driggs*, also saw her again at about the same time, and correctly noted her course and heading, as follows (p. 21):

"Q. Where was the steamer with reference to the outer red buoy when the tugboat blew the last whistle? A. She was steering in for the red and black buoy, pointing about the centre of them, I should judge."

(See also pp. 15, 30, 31, 55.)

It was alleged in the libel that the course of the tug prior to the collision was S. S. E. (p. 2), but Captain Winnett's evidence was to the effect that the course was S. S. E. or S. E. by S. Captain Winnett furthermore claims that his course brought the black fairway buoy slightly on his port bow, but as he admits he was taking the pilot-boat to her station, which is to the eastward of the black fairway buoy (p. 126), his statement of the bearing of the black buoy is evidently an error for starboard bow. Locating his vessel a quarter of a mile N. W. or N. N. W. from buoy G 2 (p. 24), so that this buoy would be half a point on his port bow, his course would lead in a line between the fairway red and black buoys, and show the black buoy on his starboard bow. Moreover, that his course was to the eastward of the black buoy, is clearly shown by the testimony of Pilot Berry, and the boat keeper Waugh of the *Driggs*. Berry (at p. 15) says:

"Q. What course did you go? A. We were steering about southeast by south, or south-southeast, crossing the

Q. For what buoy would that head you? A. *That would head us a little outside of the outer black buoy.*"

Berry, page 21, says:

"Q. Was the course that you were steering going to take you above or below the outer black buoy? A. *To the eastward of it.*

Q. The course that you were steering would take you about how near to the first black buoy, if you did not change and there had been no collision? A. It would take me 300 to 400 feet *to the eastward of it.*

Waugh (at p. 56) says:

"Q. You were not aft at all to see what the compass course was? A. I was not aft, but I could tell pretty near, because when she was towing she was crossing the channel.

Q. How was she crossing the channel; that is, towards what buoys—in what direction? A. *Heading between the two outer buoys.*

Q. To take you out to the station? A. *To take us out to the station; she had just passed between the two outer edge spar buoys* heading out between the outer red and the outer black one."

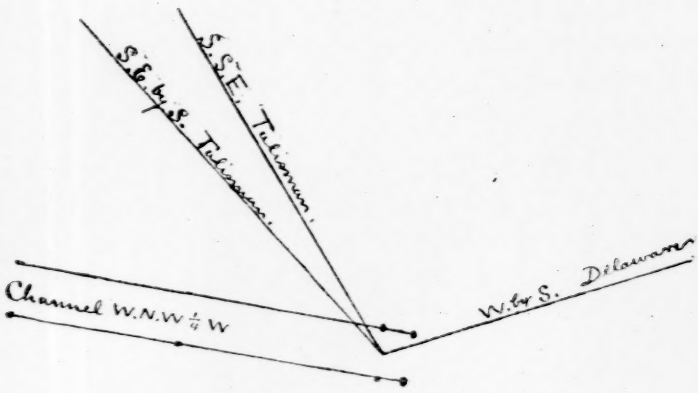
Further (at p. 59), Waugh says they were "heading outside of the outer black can buoy, heading for our station."

The evidence of these witnesses, being disinterested, is entitled to superior credit (The *North Star*, 22 U. S. App., 242, 253); and it is evident if *Talisman* was heading between the fairway buoys and outside the black fairway buoy, that buoy must have been on the *Talisman's* starboard bow.

Winnett, however, states the black buoy was on his port bow (pp. 24, 25).

Whether the course was S. E. by S. or S. S. E. is not of much consequence, and it may be taken that the *Talisman* was heading between the outer fairway buoys or towards the black one, S. S. E. or S. E. by S., which brought her in collision with the *Delaware* midway in the channel, near a line drawn across from G 2 to G 1, the outer spar buoys (Liber, p. 2; Aus., p. 5; Evidence, pp. 16, 18, 19, 56, 57, 119, 73).

From the time the *Talisman* sighted the *Delaware*, when the squall passed over, about four minutes before the collision, and when the *Delaware* was about a mile off, the *Talisman* did not change her course nor abate her speed, but maintained both steadily until actual collision (pp. 16, 25, 30, 64, 122), which occurred approximately as shown in the following sketch.



8. *Speed of the Vessels.*—The speed of the *Delaware* was estimated by her witnesses to be about ten knots, and is shown by calculation from the revolutions of her engines, the pitch of the propeller and slip (p. 49), to have been $9\frac{8}{10}$ knots. This was not abated until the captain reversed the engines, when the *Delaware* was about one or two of her lengths off from collision (pp. 38, 122).

At the instant of collision, her speed was estimated by her witnesses to be 3 or 4 knots, and was thought by the

opposing witnesses to be much greater (pp. 76, 105, 118). Whatever the actual speed may have been, it was sufficient to push the *Talisman* along through the water ahead and to port a distance of about 400 feet from mid channel, where the collision occurred, to 160 feet north of the southerly edge of the channel, where the tug-boat sank and now lies (pp. 32, 38, 39, 69, 70).

The vessels were locked together about a minute before *Talisman* sank (p. 69), indicating a considerable speed on *Delaware* at collision, and that she must have pushed the tug a good ways from the place of collision before she sank. It is probable the *Delaware's* swing off two or three points to port, estimated by Capt. Thomas (p. 39), was due to the *Talisman* dragging along with her greatest length on the steamer's port bow.

At full speed the engines of the *Talisman* make 120 revolutions, and during the time she was towing the *Driggs* and up to the collision, her engines were making, according to the testimony of her engineer, 60 revolutions (Flannery, pp. 63, 64). This would probably drive her considerably over half speed. The speed at which she was actually towing the pilot-boat was estimated by those on board the *Driggs* at 5 knots, and by the lookout of the *Delaware* at 5 or 6 knots.

Berry (at p. 15) says:

"Q. How fast would you judge was the *Talisman* towing the pilot-boat? A. I should judge about five knots."

Waugh (at p. 56) says:

"Q. Was she going fast or not? A. Towing us probably about five miles."

She was towing at rate of five miles at the collision (pp. 60–61).

Underwood (at p. 97) says:

"Q. Did the *Talisman* seem to be steaming when you first saw her? A. Yes; she was steaming.

Q. Could you judge about what rate she was making? A. I should judge, as near I could tell, about five or six knots."

The following table will show conveniently the comparative speed of each vessel:

1 mile	6,080 feet.
¾ "	4,560 "
½ "	3,040 "
⅜ "	2,280 "
¼ "	1,520 "
⅛ "	760 "

Delaware. 10 Knots.	Speed. Time.	*Talisman.* 5 Knots.
¾ mile	4½ min.	⅜ mile.
½ "	3 "	1,520 feet.
2,026 feet	2 "	1,013 "
1,013 "	1 "	506 "
506 "	30 sec.	253 "

9. *Time and Place of Collision.*—The time of the collision was 4 minutes past 10 A. M. on the 16th of September, 1893 (pp. 50, 72).

An accurate determination of the place of the collision is important, because the decision of the District Judge was that the collision occurred on the southerly or westerly (lower) side of the channel, and that the pilot of the *Talisman* was justified in presuming that the *Delaware* would not proceed into the waters of that side of the channel, but would port her helm and pass up in the waters of the northerly or easterly side of mid-channel (p. 132).

This important finding of fact is at variance with the location of the place of collision in the libel, and with the main body of the evidence in the case, including the testimony of the presumably disinterested witnesses called from the pilot-boat.

The charted course of Gedney's Channel is W. N. W. ¼ W. (p. 123). The limits of the channel are marked by a series of spar buoys; those on the northerly side being painted red, and showing red electric lights at night; those on the south being painted black, showing white electric lights at night. The outer entrance to the channel is

marked by two large can or tank buoys called the "fairway buoys," which are situated about 350 feet outside of the outer spar buoys (Chart, Libt.'s Ex. 1). The one on the northerly side is painted red, and that on the southerly side black. These show no lights at night (pp. 57, 58, 14, 22).

In the libel (Record, p. 2), the place of collision is stated as follows:

"That said collision took place between 10 and 11 o'clock that morning *in the middle of Gedney's Channel*, where said tugboat now lies sunk."

In the answer (p. 6) it is stated "that she (tug) was struck about amidships and carried a distance of about 500 or 600 feet to the lower edge of the channel, where she sunk, and now lies about on a line with the lower or black buoys marking the southwesterly side of the channel."

This would locate the place of collision about or a little north of mid-channel, as the channel, at that point, is 1,100 feet wide (Berry, p. 16).

In his evidence Capt. Winnett endeavored to locate the place of collision more to the southerly side of the channel than he had done on his own oath in the libel. He testified (p. 27):

"Q. What part of Gedney's Channel was it the collision occurred in? A. She (*Talisman*) was about 400 feet north northwest of No. 1 buoy when she was struck."

By "No. 1 buoy" he meant the black fairway buoy.

"Q. What do you call No. 1 and No. 2? A. The entrance buoys.

Q. From the outside? A. Yes, sir; No. 1 and No. 2; the reds are even; the blacks are odd" (p. 22).

He further explained that when he referred to "No. 2 buoy," he meant the red can buoy (p. 24).

Capt. Winnett later in his evidence says he noticed the *Delaware begin* to swing to port about one minute after the last whistle was sounded, when he was about 100 yards south and west of No. 2 (p. 30). As Peyton, the wheelman, who had a compass before him says, "she

just started paying off" at the time of collision (p. 105), this evidence of Capt. Winnett's tends to show the collision actually occurred above or to the northward of mid-channel.

The location of the place of the collision as stated in the libel, however, is that which is supported by the disinterested evidence adduced by the libellants and by the evidence of the claimant.

Berry, captain of the pilot boat *Driggs* (p. 26), testified:

"Q. Whereabouts did the collision actually occur in the channel? A. I should judge the collision actually occurred about the centre of the channel."

Captain Berry further testified (p. 18):

"Q. You had been above it and had been across it, and were about the centre of it at the time of the collision? A. At the time of the collision, when the tugboat, I suppose, was a little over the centre.

"Q. And you were a little to the northward of the centre still? A. Northward and eastward. * * * "

"Q. What you meant to say was you were on a course southeast by south or south-southeast at the time of the collision? A. About the time of the collision.

Q. *You hadn't been in the channel very long before?* A. *No.*"

Waugh, boat keeper on the *Driggs*, located the collision as follows (p. 57):

"No, we were just inside the channel; we might have been very near half way in the channel.

Q. Whereabouts was the collision? A. I should judge the *tow boat was about in mid-channel when she was struck;* that is, allowing for the length of the hawser and everything, pretty near mid-channel, I should judge."

At page 56 Waugh testified:

"Q. How was she (*Talisman*) crossing the channel; that is, towards what buoys, in what direction?

A. Heading between the two outer buoys.

Q. To take you out to the station?

A. To take us out to the station; *she had just passed between the two outer edge spar buoys*, heading out between the outer red and the outer black one."

The "two outer edge spar buoys" referred to by the witness, one red and one black, are G1 and G2 on the chart, and as the tug had passed between those two before the collision and was heading out between the outer can buoys, it is evident the place of collision must have been near a line drawn from G1 to G2, and inside a line drawn from the red to the black Fairway buoys.

The location of the place of collision by the *Driggs* witnesses is entitled to more credit than attaches to the interested evidence of libelants.

The *North Star*, 22 U. S. App., 242, 253.

Harpenau, pilot of the *Delaware* (p. 119), located the collision at the same place.

"Q. In what part of the channel did the collision occur? A. *Very near the centre.*

"Q. Between the line of what buoys? A. Between the red and black buoys."

Captain Thomas of the *Delaware* could not locate the place of the collision with any certainty, because he had been on deck only about a minute before it occurred (p. 44), and *had not seen any of the buoys* (pp. 37, 42).

The collision was right at the bar (p. 14), near on a line drawn from the buoy G2 (red electric) on the north side of the channel, to the buoy G1 (white electric) on the other side of the channel.

The evidence shows that the pilot-boat hardported just before the collision and had swung so as to be heading about across from G2 to G1.

Captain Berry testifies that at the time of the collision, Gedney buoy No. 1 (meaning No. 2, as the buoys are charted), was under the stern of the pilot-boat. He says (p. 19):

"Nearest to which one (of the buoys) were you. Nearest to No. 1 or No. 2? A. We were about half way between the two. Perhaps nearer to No. 1. No. 1 would be under my stern; I would be crossing the channel."

It is obvious that by No. 1, the witness meant the outer red buoy (No. 2), since No. 1 was on the southerly side of the channel, ahead of the *Driggs*.

Berry (p. 14) further says:

"Q. Which way did you go after you crossed the bar? A. We never got across the bar; that is where we struck."

Cracroft, third officer of the *Delaware*, who was on the bridge, located the collision as follows (p. 73):

"Q. Where did the collision occur? A. Just at the entrance of Gedney's Channel, by the first red buoy.

"Q. How far out beyond the buoy were you at the time of the collision? A. We were just past it.

"Q. Just past the red buoy? A. The red buoy; yes, sir.

"Q. Just inside of it? A. Yes, sir."

The "first red buoy" referred to by Cracroft, is the red Fairway buoy, which, by the chart, appears to be about 350 feet outside of the red electric buoy G2. Therefore, one length of the steamer, which would put her "just past it," would place the collision just at the bar near a line from G1 to G2, where Berry (pp. 14, 19, 20) and Harpenau (pp. 119, 125) locate it.

The positions at the time of collision may also be approximately shown by the time which elapsed after the last whistle was blown, and the calculation of the distance the Talisman would make in that time. Libelants' evidence is that the last whistle was blown a little more than one minute before the collision (pp. 26, 30, 121), and that at the time it was blown the *Talisman* was above or near the northerly edge of the channel (p. 116–25)). In one minute the *Talisman*, at the rate of five knots an hour, would have made 506 feet, so that, as she was proceeding at an angle across the channel, she would not, by this calculation, be quite in mid-channel at the me of the collision. The *Delaware* in one minute, at the rate of ten knots, would have made 1,013 feet; but as she was reversing during this minute and was only going three or four knots at the time of collision, she would probably have made about 500 to 600 feet, or say two ship's lengths (pp. 38, 122), which accords with her own testimony and thus corroborates libelants' evidence, that the whistle was blown about a minute before the collision.

From the pleadings and the foregoing evidence, mostly that produced by the libelants, it appears, with reasonable certainty, that the collision occurred (1) substantially in mid-channel; and (2), near a line drawn from G1 to G2, the outer spar buoys, and about at the bar; and that accordingly the finding of the District Judge that the collision occurred on the southerly or westerly side of the channel was incorrect.

10. *Whistle signals before the collision.*—In the libel the case alleged was one of an agreement by whistle signals, and of failure to pass as agreed (p. 2).

The allegation was, that when the steamship appeared over a mile distant, and heading a little south of west, the tugboat "blew one blast of her whistle, which was answered by the steamship with one blast of her whistle, and said steam tug continued on her south-southeast course. That a few minutes after this the master of said tugboat, fearing that *the steamship was approaching too near for safety*, again blew one blast of the tugboat's whistle, and, receiving no response thereto, ordered one of the deckhands to let go of the tow rope to the pilot-boat, but before the order could be executed, the steamship struck the tugboat *Talisman* a very heavy blow," &c.

It was apparently assumed by the pleader that the vessels, although several miles outside of Sandy Hook, were navigating under the rules provided by the Revised Statutes and the Supervising Inspectors, and that, accordingly, signals were required to be given, and that no change of course necessarily followed the signals, whereas, in fact, the vessels were in coast waters, and were under the International Rules of 1885, which do not require signals, but provide that if signals are given corresponding change of the helm must be made.

In the evidence, the agreement of signals alleged in the libel was not proved.

When the *Delaware* was supposed to be about a mile off, the *Talisman* sounded a single blast upon her whistle (pp. 15, 25). No witness in the case testified that that

whistle was answered, and Captain Winnett and Captain Berry both admitted it was not answered (pp. 15, 25).

When the *Delaware* was from a quarter to an eighth of a mile off, and the *Talisman* was a little above or near the northerly edge of the channel (p. 116), she sounded another single blast (pp. 15, 25, 27) which the libel (p. 2), the evidence of Captain Berry of the *Driggs* (p. 21), of Captain Winnett (pp. 25, 27) and of six witnesses from the *Delaware* (pp. 37, 39, 76, 90, 96, 105, 112, 116, 118) shows was not answered.

Notwithstanding this mass of evidence, including the admissions of the libel and the chief libelant, three of the libelants' witnesses still endeavored to make out a case of agreement in signals by testifying that the *Delaware* answered *the last* signal blast (pp. 12, 52, 54, 64).

No credit can be given to this evidence, which was rather awkwardly directed to proving an agreement different from that alleged in the libel.

When the *Delaware* was probably a length off (pp. 26, 106) the *Talisman* sounded a signal of three short blasts (pp. 106, 26). Notwithstanding the two single blast signals sounded on the *Talisman's* whistle, her helm was not changed, nor were her engines reversed in accordance with her three short blasts signals. No change of helm or speed was made by the *Talisman* before the collision (pp. 25, 26, 30, 56, 64).

The *Talisman* was head to the tide and could have slackened speed or stopped without danger (pp. 70, 119).

11. *Realization of the risk of collision by those on the pilot-boat and those on the Talisman, except Captain Winnett.*

The danger of collision at the time the second whistle was blown was acknowledged in the libel (p. 2). It was clearly appreciated by the engineer of the *Talisman*, who is also a licensed pilot (p. 62), and by the pilots on the *Driggs*, when the *Delaware* was from one-eighth to a quarter of a mile off.

The engineer of the *Talisman* left the engine-room and went aft to throw off the rope between the tug and tow,

and the pilots hard-ported their wheel and got out their lifeboat, so that although their tow line remained taut until parted by the collision, the pilots and the pilot boat escaped all harm.

Flannery, the engineer of the *Talisman* (p. 64), testified:

"Q. When did you first think there would be a collision? A. When I first thought there would be a collision was after the first whistle.

"Q. And after the second whistle, what did you think? A. I knowed there was going to be one then."

Pilot Berry of the *Driggs* (p. 16), testified:

"Q. When did you first think there would be a collision? A. When she was getting about three times her length from us (1,035 feet); we had three pilots aboard; I called their attention down below; I said 'there's going to be trouble.' Those three men came on deck; they had seen nothing before that; they had seen her outside; they were getting their breakfast."

Waugh, boat-keeper of the *Driggs* (p. 57), testified:

"Q. When did you first think there was going to be a collision? A. When the *Talisman* blowed the whistle the second time.

"Q. After that, did you give any orders about getting the yawls out? A. I told the men to get aft; in the meantime we had the yawl alongside on the port hand just towing alongside, and I dropped that aft.

"Q. Why did you order the men aft? A. I was afraid we were going to get it; it was my idea at the time."

He says (at p. 59):

"Q. At the time of the collision, you were headed at right angles to the channel? A. At the time of the collision, we were aport on the pilot boat, and I think the towboat was too, at the time she was struck.

"Q. Both your boats were then at right angles to the channel? A. Yes, because Mr. Berry hard a ported the helm, and that slewed us."

At page 60, he says:

"Q. Before you made this change of course, how did the steamer bear from your vessel; how many points off the port bow? A. Probably 4 points.

"Q. And the change brought her about abeam? A. Very near abeam, yes."

At page 61, re-examined, he says:

"Q. Did you feel afraid the steamer would hit the pilot-boat? A. Yes; I was at the time, I thought it might get across and hit us.

"Q. Did you hear anything said why at the time they put the wheel aport on the pilot-boat? A. I heard Mr. Berry say, 'My God! What is that man going to do—drown us?' or something similar to that.

"Q. How much do you think you sheered the head of the boat under that last porting, just before the collision? A. Might have sheered two or three points.

"Q. Your fear was that your hawser would get foul? A. I was afraid he might pick up the hawser; that was my idea.

"Q. *You thought possibly he would go between the tug and the schooner?* A. *I did; yes.*"

Pilot Berry (p. 19) testifies that at the time of the collision (which was after he had ported), his vessel was heading across the channel with the buoy (meaning G2), under the pilot boat's stern.

The distance the *Delaware* was away at the time that the second whistle was blown by the *Talisman* is estimated by the witnesses as follows:

Berry (p. 15) estimates the distance at one-eighth or a quarter of a mile.

Waugh, boat-keeper (p. 56), says, it may have been a quarter of a mile.

Captain Winnett himself (pp. 25, 26) says:

"Q. How near do you think the steamer was to you when you blew the second blast? A. About a quarter of a mile from me, I should say, that is, as near as I could judge."

This distance may also be estimated by the position of the *Talisman* at the time when the whistle was blown, and a calculation based on the distance the *Delaware* must have been away based on the time it took the *Talisman* at her speed to go from where she blew the last

whistle to the place of collision. Such a computation would show the *Delaware* was about one-fifth or one-sixth of a mile off at this time.

ARGUMENT.

The pilot of the *Delaware* committed a fault in not slackening speed earlier. The *Talisman* was in fault for failing to slacken speed or stop and reverse; for failure to be on her own starboard side of the channel with her tow, or to stay out of it altogether, and for failure to navigate in accordance with her whistle signals. The *Delaware* is absolved from liability for the fault of her pilot by the third section of the Harter Act, 27 St. at Large, C. 105, p. 445.

Diagram.

The testimony may to some extent be illustrated by the diagram; but it is impossible to set down the place of collision and previous courses and say with certainty the collision occurred as thus shown. Two positions and courses are shown on the annexed diagram, one in part based on evidence from the *Driggs* that the *Talisman* was heading *outside* the block fairway buoy, the other on Winnett's evidence, that he had that buoy on his port bow. Both show the collision in mid-channel as averred in the libel, and clearly proved. In each the *Talisman's* course is given as S. S. E. and S. E. by E.

The first location of the two vessels is given 4½ minutes before the collision, when the *Delaware* was three-quarters of a mile from the point of collision, and steadied on course W. by S., and the *Talisman* three-eights of a mile from the point of collision heading S. S. E. or S. E. by S., and between ¼ and ½ of a mile N. W. or N. N. W. of buoy G. 2. About this time *Talisman* sounded the first one-whistle signal.

The second location of the vessels is when the second one-whistle signal was sounded, a little over one minute before the collision.

The third position shows the vessels in collision and the pilot boat swinging across the channel to hard aport helm. The *Delaware* and *Talisman* bows from one another practically E. by S. and W. by N. until just before the collision. *Delaware* about five points on *Talisman's* bow, and *Talisman* about two points on *Delaware's* bow.

POINTS.

I.

The *Talisman* was in fault for failing to slacken speed or stop and reverse.

The regulations of 1885, under which the vessels were navigating at the time and place of the collision, provide as follows:

"ARTICLE 16. If two ships under steam are crossing so as to involve risk of collision, the ship which has the other on her own starboard side, shall keep out of the way of the other."

"ARTICLE 18. Every steamship, when approaching another ship, so as to involve risk of collision, shall slacken her speed, or stop and reverse, if necessary."

"ARTICLE 22. Where, by the above rules, one of two ships is to keep out of the way, the other shall keep her course."

"ARTICLE 23. In obeying and construing these rules, due regard shall be had to all dangers of navigation, and to any special circumstances which may render a departure from the above rules necessary, in order to avoid immediate danger."

"ARTICLE 24. Nothing in these rules shall exonerate any ship, or the owner, or master, or crew, thereof, from the consequences of any neglect to carry lights or signals, or of any neglect to keep a proper lookout, or of the neglect of any precaution which may be required by the ordinary

practice of seamen, or by the special circumstances of the case." * (23 Stat., 438).

The essential facts, as shown in the preceding statement of the evidence, are, that for probably four minutes before the collision, the *Delaware* was making a course about W. by S., for the mouth of Gedney's Channel, pointing between the outer fairway buoys; that the *Talisman* was pointing for the pilot station on a course S. S. E. or S. E. by S., angling across the channel; that the *Delaware* was proceeding at a speed of about 10 knots an hour, and the *Talisman* at a speed of about five knots; that neither vessel changed her course or speed until the *Delaware* was about two ship's lengths from the place of the collision, when her helm was hard-starboarded and her engines stopped and reversed, with the result that her headway was checked to about three or four knots an hour, but her course or heading was not changed; that when the vessels were from three-quarters of a mile to a mile apart, the *Talisman* blew a single blast

* The International Rules of 1890, which were only to go into effect on proclamation of the President, have never been in operation.

On the 13th of July, 1894, the President indeed issued a proclamation, designating the 1st of March, 1895, as the date for this act to take effect, but by an Act of Congress, approved February 23, 1895, the proclamation was nullified, and it was therein provided that the Act of August 19, 1890, should not take effect, as directed by the President's proclamation, but at some future time to be determined and proclaimed by the President.

Spencer, Marine Collisions, p. 38.

The proposed rules of 1890 contain a modification of the former rule with regard to slackening speed or stopping and reversing, in view of risk of collision. Article 23 of those rules provides:

"That every steam vessel which is directed by these rules to keep out of the way of another vessel shall, on approaching her, if necessary, slacken her speed, or stop or reverse."

Congress subsequently passed a statute enacting rules for the Great Lakes, approved February 8, 1895, in which Article 23 of the International Rules of 1890 is re-enacted as Rule 21; but at about the same time also enacted a set of rules for the navigation of harbors, rivers and inland waters of the United States, in which it was provided that the provisions of Sections 4233, 4412 and 4413 of the Revised Statutes should be observed in such navigation.

And Rule 21 of Section 4233, provides:

"That every steam vessel, when approaching another vessel so as to involve risk of collision, shall slacken her speed, or if necessary, stop and reverse."

It is impossible, therefore, to determine which rule the Congress deemed most likely to avoid collision.

upon her whistle, which was not answered, and when they were from one-eighth to a quarter of a mile apart she blew another signal blast, which was not answered, and that shortly afterwards the vessels were in collision in the middle of the channel, near the outer buoys; that the course and heading of the *Delaware* indicated, or should have indicated, to the *Talisman* that the *Delaware* was intending to pass ahead, and there was nothing, either by signal or by swing of the vessel, or in the circumstances of the tug and pilot-boat's position in the northerly half of the channel to indicate that the *Delaware* intended to or would be able to port, so as to pass under the pilot-boat's stern, after rounding the outer buoy, which it was seen she was intending to round, but on the contrary, the indications, from the course and speed of the *Delaware*, and her failure to answer the *Talisman's* signals, were that she was intending to pass ahead; that at the last moment the *Talisman* intended to starboard and allow the steamer to pass ahead, (27, 33), but her captain thought he could not swing quickly enough without throwing off the towline, which was not thrown off in time; that, accordingly, the speed of the *Talisman*, which was not diminished, contributed to the collision, as with less speed she would not have progressed so far towards the line of the *Delaware's* course, and could easily have avoided the collision by starboarding had she not been so far into the channel; that the *Talisman* was head to the tide, and could have avoided the collision by stopping or slackening speed at the time she blew her last whistle signal or afterwards, and at the time she blew such signal, the risk of collision was plainly apparent to her engineer, who was also a pilot, and to the pilots on board the *Driggs*, and that, in fact, there was immediate danger of collision at that time, unless the *Talisman's* speed was slackened or stopped.

Upon those facts, it is submitted that the *Talisman* must be charged with fault for infringing Article 18 and Articles 23 and 24.

This case was tried in the District Court, February 15th and 19th, but the decision was not handed down until

March 7th (p. 1), a few days after the decision of this Court in the *Britannia*, 153 *U. S.*, 130.

Prior to the decision in that case there had been differences of opinion between the District Judge for the Eastern District of New York and the Circuit Judges and Circuit Justices sitting in the Second Circuit as to the right interpretation of the 16th and 18th Articles. Although the District Judge has presided in his Court since 1865, the industry of appellant's counsel has been unable to find a single reported case under the starboard hand rule in which he has not absolved the preferred vessel from all fault where it has kept up its speed, and held the other vessel solely responsible for collision; while the Circuit Judges often reversed those decisions, holding the preferred vessel in fault for failing to observe Rule 21 of the Revised Statutes, Section 4233, which corresponds to the present Article 18.

The decision in this case was, therefore, in line with the District Judge's well known interpretation of the starboard hand rule. Reference should at this point be made to some of those decisions in which the facts were similar to the present, and to the history of the cases upon appeal.

In The *Favorita*, 1 *Benedict*, 30, Judge *Benedict*, under circumstances of risk and danger similar to those existing in the present case, held the *preferred vessel in fault for stopping*, but his decision was reversed on appeal by Judge WOODRUFF, 8 *Blatchf.*, 539, whose decision was affirmed in the Supreme Court, 18 *Wall.*, 598. The Court say:

"It is said that if the *Manhanset* had advanced instead of stopping, she would have cleared the steamship. This may or may not be true, but if true, she is not in fault for this error of judgment."

In The *Columbia*, 23 Blatchf., 268, a case much resembling the present, the tug *Baxter* was entering East River with a tow astern, and had the *Columbia*, bound for South Ferry Slip, on starboard hand. The *Columbia* blew one whistle, which was not answered. She proceeded one hundred yards, and then blew another single blast, the *Baxter* meantime keeping right on. After the second single blast, the *Baxter* gave a signal of two blasts. The

Columbia then stopped and backed. Judge BENEDICT held the *Baxter* solely in fault. On appeal, *held* both in fault, the *Columbia* for *omitting to stop when her first signal was not answered* and risk of collision became obvious. Mr. Justice BLATCHFORD (p. 270) said:

"The District Judge says in his opinion (8 Fed. Rep., 716), that no doubt the collision would have been avoided if the *Columbia* had been stopped in time to permit the *Baxter* to pass; but that, as the *Columbia* had the right of way, she had a right to keep on. I cannot assent to this view. When the *Columbia* received no response to her first signal of one whistle, she ought to have stopped and backed, instead of giving her second signal of one whistle. She saw that the *Baxter* was persisting in going on, and was not responding affirmatively by a signal of one whistle, and that there must be a collision if the *Columbia* also kept on. It was the duty of the *Baxter* primarily to keep out of the way, and the correlative duty of the *Columbia* to keep her course; that duty was imposed on the *Columbia* for the purpose of enabling the *Baxter* to keep out of the way. *But it was not permissible for the Columbia to persist in going on, under the plea of keeping her course, when she saw that her signal was not affirmatively responded to by the Baxter.* On the contrary, under Rule 21 of Section 4233, there then became risk of collision, and it was the duty of the *Columbia* to 'slacken her speed, or, if necessary, stop and reverse'; and, under Rule 24, special circumstances existed which made it necessary for the *Columbia* to stop, 'in order to avoid immediate danger.' The fault of the *Baxter* was no excuse for the fault of the *Columbia*. The situation was plain to the *Columbia*, and she was bound to deal with it as it existed, not as it ought to have been. These principles are established by decisions of the Supreme Court (*Chamberlain* v. *Ward*, 21 How., 548, 567, 568; The *Gray Eagle*, 9 Wall., 505, 510; The *Maria Martin*, 12 Wall., 31, 47; The *Ariadne*, 13 Wall., 475, 479; The *Cayuga*, 14 Wall., 270, 275, 276; The *Continental*, *Id.*, 345, 359; The *Sunnyside*, 91 U. S., 208, 214, 215; The *America*, 92 U. S., 432, 438."

In the *Frisia* (24 *Blatchf.*, 40), a steamer collided with a bark towed by a tug on a hawser. The courses of the steamer and the tug were crossing, and involved risk of collision, and the tug had the steamer on her own starboard side. The tug attempted to cross ahead of the steamer, without an agreement of signals, and although this was plainly seen by those in charge of the steamer, she did not stop and reverse until a collision was unavoidable. The District Court (BENEDICT, *J.*), held that the *Frisia*, preferred vessel, was without fault, and that the tug was solely responsible. On appeal, the decree was reversed, and the *Frisia* was held in fault. BLATCHFORD, *J.*, in delivering judgment, said (at p. 48):

"As to the *Frisia*, he" (the District Judge) "held that the whistles of the tug were all of them blown when the *Frisia* was so close at hand that stopping and reversing her engines was the only thing then to be done by her towards avoiding a collision, and that, in the absence of timely whistles from the tug, the *Frisia* was not chargeable with knowledge of the intention of the tug to attempt to cross the bows of the *Frisia*. The District Judge said: 'If, notwithstanding the omission of the tug to give timely notice by her whistle, the circumstances were such as to inform the steamer in time that the tug was intending to cross her bows, such circumstances cast upon the steamer the duty, by a timely change of her course or slacking of her speed, to avoid the danger attending the course selected by the tug. I find in the circumstances proved nothing calculated to convey such information to the steamer.'

"The course of the *Frisia* being south-southwest and that of the tug being west-northwest, it was necessarily apparent to those on the *Frisia* that the tug was crossing the course of the *Frisia* at right angles. * * *

"The answer also says, as to the *Frisia:* 'Those in charge of her navigation first saw the tug *John N. Parker* and the bark *James L. Harway* in tow thereof about three points or more on the port bow of the steamship, and distant three-quarters of a mile. The *Frisia* continued upon her course, which was about south-southwest, and those in charge of her navigation seeing that the said tug and bark were taking no measures to avoid the steamship, though it was their duty to do so, blew a single blast of the steam whistle to call the attention of the tug and bark to their duty, and to warn them to go under the stern of

the steamship. The said signal was unheeded by the tug and bark, and they continued at undiminished or at increased speed at a course crossing the course of the *Frisia*, ahead of the *Frisia*.' It is also apparent from the testimony of the chief officer and the pilot of the *Frisia*, that they saw all the time that the tug was on a course crossing the bow of the *Frisia*, and was intending to cross her bow, and that they thought the *Frisia* could do no harm by keeping on. Under these circumstances, the duty of the *Frisia*, under Rule 21 of Section 4233 of the Revised Statutes, to at least slacken her speed much sooner than she did, was plain."

Notwithstanding these reversals, the District Judge appears steadily to have adhered to his own interpretation of the rule, except that, with some humor, in the case of the *Waverly*, 41 *Fed.*, 602, he absolved the preferred vessel from fault of stopping, and thus contributing to the collision, and (at p. 608 of that case) he said:

"The other charge, that the *Anglia* was in fault for not keeping up her speed, must, in view of the fact that the whistling of her tugs had not been answered, be held no fault, especially as the *Waverly* was seen to be swinging towards Brooklyn. In the case of *The Columbia*, 25 *Fed. Rep.*, 644, the Circuit Court, reversing the decision of this Court, held it to be the duty of a privileged vessel, seeing the other vessel to be persistent in going on, and not responding to whistles from the privileged vessel, to slacken speed, and, if necessary, to stop and reverse. The rule applied in the case of *The Columbia* by the Circuit Court is applicable here, and compels a decision in this case adverse to the claim of the *Waverly* that it was fault in the *Anglia's* tugs to stop and reverse. Let a decree be entered in the case of *Williamson* dismissing the libel with costs."

The decision which absolved the *Talisman* from fault in the District Court proceeded, as in the *Columbia* and *Frisia*, *supra*, upon an erroneous finding of fact. This finding was as follows (p. 132):

"The vessels were on crossing courses and in Gedney's Channel. When the *Delaware* approached near to the tug, the tug had reached the western side of the channel. The situation justified the pilot of the tug in supposing that the steamship would go under his stern or stop, and repelled any suspicion that the steamship would pass

ahead of him and over to the western side of the channel. If he had acted on such a supposition and stopped, he would have been in fault."

As only one witness on each side was examined in open court, and the case was mainly presented on depositions, this Court can determine as well as the District Judge the place of the collision and the previous bearings of the vessels each to the other.

An inquiry as to the correctness of these findings involves consideration of three matters:

(1.) The place of the collision.

(2.) Whether the *Delaware*, for some time preceding the collision, had been pointing towards or astern of the *Talisman*, and would have avoided her by holding her course, but instead struck her while swinging under a starboard helm.

(3.) Whether, assuming she had been continuously pointing ahead of the *Talisman*, there was any indication from her course, or from the relative situations of the vessels with regard to the buoys, that the *Delaware* would or could alter her course so as to pass astern of the pilot-boat after rounding the red Fairway buoy.

(1.) It has been already shown (*ante*, p. 16) that, according to the pleadings and the great preponderance of the evidence, including that of the disinterested witnesses on the pilot-boat, the *Talisman* had not reached the westerly (southerly) side of the channel, at the time of the collision, and that such finding was incorrect. The finding that the situation justified the pilot of the tug in supposing that the steamship would go under the stern of the pilot-boat, so far as it depends upon the finding as to the place of collision, is also incorrect.

(2.) The finding that Winnett was justified in supposing the *Delaware* would pass under his stern, so far as based on his statement, that the steamship had been swinging under a starboard helm from the time he first saw her a mile off, until the time of the collision, is also incorrect.

He speaks of the *Delaware* as being "on his beam" at various times (pp. 24, 26), "as heading almost right at us" (p. 25), and claims that all the port side of the steamer was in sight to him when he blew his first whistle signal (p. 25).

The statement that the *Delaware's* smokestack and mast were just open to him, and he could see her port side when he blew his first whistle (p. 25) must obviously be an error for starboard side, as from the course the *Delaware* pursued during the last three-quarters of a mile before the collision, it is impossible she could have been far enough north, so that her heading to the southward of west (which Winnett admits (25)), and for the mouth of the channel (as testified by libelants' witnesses, pp. 15, 21, 30, 31, 55), and the pilot of the *Delaware* (p. 114) would have shown any part of her port side to Captain Winnett (see diagram, also Harpman, pp. 118, 119).

Furthermore, Captain Winnett says that at the time the smokestack and mast were just open to him, he could see the *Delaware's* port side, "I then blew one blast on my whistle" (p. 25).

If he saw the port side of the steamer a mile and a quarter off, he would, of course, know that she was on a course to pass far astern of him, and a single blast on his whistle in those circumstances would have been absurd.

Later in his evidence Winnett says he noticed the *Delaware begin* to swing when *Talisman* was 100 yards south and west of buoy No. 2, in the channel, a minute and a half after the last whistle was blown, which would be almost at the moment of collision (p. 30).

The witnesses from the steamer and from the *Driggs* all agree that there was no swinging on the part of the steamer, and that she maintained a steady course, pointing ahead of the *Talisman* until Captain Thomas had the helm put hard astarboard, and when that order was finished, she was not more than a ship's length off the place of collision (pp. 30, 68, 118, 122, 123), too near to swing appreciably before the blow.

The testimony from the *Delaware* is moreover explicit that up to the time the vessels were two ships' lengths off,

the *Talisman* bore two points or more off the steamer's starboard bow.

Captain Thomas says that *Talisman* was two or three points on starboard bow when he came up a minute before the collision (p. 37).

Harpenau says three or four points (p. 117) at first, and later about one point (p. 116).

Underwood, lookout, says two or three points (p. 95); his report of her was, "vessel on the starboard bow" (pp. 74, 95, 101).

Peyton, wheelman, says two points (p. 104).

Crocroft, third mate, says she continued to bear on the starboard bow until the moment of collision (p. 75).

The *Delaware* was bearing about four points on the *Talisman's* port bow (Waugh, 60), actually five points, if the course was S. S. E. (see diagram).

The testimony from the *Delaware* that her helm was not changed, and that the *Talisman* bore on her starboard bow instead of in front, as Winnett claims, is entitled to greater weight than Winnett's mere opinion that she was swinging under a starboard helm all the time before the collision.

The *Alexander Folsom*, 6 *U. S. App.*, 153.
The *Philadelphian*, 21 U. S. App., 61 Fed. Rep., 862.

Captain Winnett's statement that the *Delaware* was swinging as under a starboard helm is not supported by the evidence of his own witnesses.

The best and most specific evidence upon the point is given by the engineer of the *Talisman*, who, in place of attending to his engines, stood looking out of the engine-room at the *Delaware*, and never took his eyes off her until the collision, and who states: "I seen no change of course by either boat" (*fols.* 64, 323, 324). When the boats were close, he sent men aft to cut the line. He then describes the way the vessels came together, as follows (pp. 64-65):

"Q. Did you hear anything from the men after they went aft? A. No; I waited in the engine-room for a reply that they had cut the line or let it go, but I got none.

Q. How long did you wait? A. Till both the boats

lapped; that is, *the Talisman had gone far enough across the ship's bow to reach the Talisman's house*, and then I went out on deck and grabbed hold of the house on the starboard side.

Q. You were standing there at the time of the collision? A. *I waited*, and *saw the steamer passing, just going along like that* (indicating), and saw her hit us."

From this, it appears clearly that the *Talisman* was crossing the *Delaware's* bow, and not that the *Delaware* was swinging up on to her under a hard astarboard helm, as Captain Winnett claims (p. 31), since, if she had swung in that way, and her bow had got as far along the side of the tug as "to reach the *Talisman's* house," it is inconceivable how she would have swung back again towards the stern so as to come into collision with the *Talisman's* port quarter.

Flannery's statement of "seeing the steamer passing, just going along like that," means that he saw the bow of the *Delaware passing down* the port side of the *Talisman* from forward aft to the port quarter, where the collision occurred. This must have been due to the forward motion of the *Talisman*, and not to a port swing under a starboard helm by the *Delaware*.

Furthermore, Walle, first deckman on the *Talisman*, says that he was below, and was called up when the steamer was about ten fathoms off; "she was then heading right to our *bow*" (*fol.* 69), and he made a diagram showing the bearings, which appears opposite page 18. As the collision occurred at the stern, it must be that the *Delaware* was not swinging either way to any substantial degree, and that the collision on the quarter of the *Talisman* was due to her getting that far across the *Delaware's* stem.

The witnesses on both sides agree that the collision occurred at about a right angle (pp. 33, 38, 53, 84, diagrams, pp. 12, 68).

Captain Winnett's theory that the vessel was swinging to port for the last minute before the collision is evidently based upon a conclusion on his part as to the effect of Captain Thomas' hard astarboard order which was disclosed in the first testimony taken in the case.

In point of fact, nobody looked at the compass or can say whether the *Delaware's* head swung off to port at all before the collision (p. 42), except, perhaps, Peyton, who says she was just beginning to pay off (p. 105).

The generally accepted theory at the present time is that a hard astarboard helm and reversed engines in a ship furnished with a right-handed screw (p. 43) will cant her head to starboard rather than to port, opposite to the way it would go if the engines were kept going ahead. That her head did not go off to port until after she was in collision, and was then dragged around by having the weight of the *Talisman* dragging on her port side, while she went her length or more after the collision, is shown by the testimony of many witnesses that the angle of the collision was substantially a right angle, and by the diagrams drawn by the various witnesses, which show the vessels in collision at nearly a right angle.

If the *Talisman* did not swing at all, had the *Delaware* swung three points before the collision, the angle of collision must have been one of six points instead of an angle of eight or nine, as stated by the witnesses.

In *Todd and Whall on Practical Seamanship*, the action of the helm on the vessel is stated (p. 23) as follows:

"WHEN THE VESSEL HAS HEADWAY.

Port Helm—Head goes to starboard.
Starboard Helm—Head goes to port.
That is, with headway, her head goes the opposite way to which the helm is put."

"WHEN THE VESSEL HAS STERNWAY.

Port Helm—Head goes to port.
Starboard Helm—Head goes to starboard.
That is, with sternway, her head goes the same way as the helm is put."

The effect of a screw propeller alone, on the ship's head, is—

"RIGHT HAND SCREW.

Engines going ahead—Head goes to port.
Engines going astern—Head goes to starboard."

Further, they say (at p. 26):

"*Whilst reversing, the rudder produces none of its usual effects to turn the ship, but, such as it is, its effect is to turn the ship in the opposite direction from that in which she would turn if the screw were going ahead;* but this effect is not much in any case. The influence of the rudder being feeble, the vessel is at the mercy of any other influences that may act upon her, as wind or tide. * * * As her headway diminishes the screw will begin to act on her head and turn her to starboard or port, according as the propeller is a right or left-hand one. Most steamers' heads would thus be inclined to go to starboard, but it requires acquaintance with any particular vessel, laden and light, to be able to tell how she will act going astern."

In *Marsden on Collisions* (3d Ed.), pp. 453, 454, the result of English experiments to ascertain the effect of a reversed propeller upon the course of a vessel is stated substantially to the same effect:

"The propeller exerts considerable turning power on the ship, whether going ahead or astern, but more particularly when going astern. This seems to depend upon the fact that the lower blades of the propeller, being more immersed, have a greater turning power than the upper. The effect is most strongly marked when the propeller is going astern and the ship has headway through the water—the circumstances under which Article 18 is usually applicable. The turning effect is in the one direction or the other, according as the screw is right or left-handed, * * * when the same is not deeply immersed and froths air with water, it exerts, when reversed, considerable power to turn the ship's head, independently of the rudder, the ship turning to starboard or port almost irrespective of the helm, according as the screw is right or left-handed. * * * Whilst the ship has headway through the water, and the engines and screw are working astern, the action of the rudder *is the reverse* of that which it has whilst the engines and screw are going ahead. * * * So marked is this diminution in the turning capability of a ship with her screw suddenly reversed from full speed ahead, that, under some circumstances, a vessel running at right angles upon a straight coast at full speed might avoid going ashore by keeping on full speed ahead with her helm hard over, when she could not keep off the shore by stopping and reversing her engines."

In a note by Judge BROWN to the case of the *Aurania*, 29 Fed. Rep., 98, 122, certain experiments with vessels of different sizes are given, showing that vessels with a right-handed screw reversed will cant to starboard whichever way the helm is put. The *Frisia*, *e. g.*, a vessel 350 feet long and 40 feet in the beam, approximately the size of the *Delaware*, canted one and a half points to starboard before stopping, which required two minutes, under a hard astarboard helm.

This action of the helm under reversed engines has been noticed in The *City of New York*, 147 U. S., 72, 87; The *Arratoon Apcar*, 15 A. C., 37, 40; The *Circassia*, 55 Fed., 113, 117.

Captain Thomas, it is true, thought that his vessel had swung two or three points under her hard-astarboard helm (p. 39), but this was evidently only a surmise on his part, as he did not see any buoys after he came on the bridge, nor did he look at the compass before or after the collision (p. 42).

Previously in his testimony (p. 38) Captain Thomas had said:

"We stopped after she had gone her own length, after the collision, about her own length, *she was still heading the same way almost.*"

Peyton, the wheelman, who had the compass before him, said (p. 105):

"Q. Did your vessel swing any? A. Yes, sir; *she just started paying off.*"

Harpenau, the pilot (p. 118) said:

"When we got our ship stopped and *going back on her, our head swung to starboard.*"

The authorities last above cited show that on this point, at least, Harpenau was right.

The impossibility of the *Delaware* having swung materially, if at all, under a hard starboard helm is shown by the testimony of witnesses on both sides, that the vessels met at substantially a right angle, and diagrams,

and that previously she had been bearing on the starboard bow.

(3.) The positions and courses of the vessels, as they approached, were not such as to lead the pilot of the *Talisman* to suppose the *Delaware* would pass under the stern of the pilot-boat.

The real inquiry in this connection is not whether the *Delaware* might have passed under the stern of the pilot-boat by keeping above the channel, or even whether she could possibly have done so after rounding the red fairway buoy, but is whether her conduct and the *Talisman's* position in the channel were such that it would naturally be supposed the *Delaware* would pass astern of the pilot-boat.

It was quite plain that her pilot did not intend to come in above the buoys, whether there was enough water there or not. He had been constantly heading for the channel since he hove in sight, and it was clearly understood that he was making for the channel to the southward of the red fairway buoy (p. 21).

The *Talisman* had blown him a single blast-whistle signal, which had not been answered, a negative intimation that the *Delaware* did not expect to pass astern. At the time she blew her last whistle the *Talisman* was probably not herself in the channel, and her tow was some distance above it, and as the *Delaware* was also above it neither master, with any certainty, could form any judgment as to whether the positions of the vessels would be such, after they got into the channel, which they were approaching at an angle, as to enable the *Delaware* to pass astern of the pilot-boat. Those on the *Driggs* did not expect her to pass astern of the pilot-boat, nor did the *Talisman's* engineer, as at the time this whistle was blown they apprehended a collision (pp. 64, 16, 57, 59). It was not expected by Captain Winnett, as he admits all he hoped for was that the *Delaware* would be able to pass between the *Talisman* and the pilot boat (p. 32, 27).

Moreover, by the testimony as to the vessels' courses it is obvious that their relative bearings remained the same

as they approached (see diagram), and this is expressly proved by Pilot Engineer Flannery (p. 68):

"Q. Had the vessels been bearing in the same relative position to each other during all the time that you saw the *Delaware* preceding the collision (during the last half mile, pp. 67-68); that is, at about right angles to each other's course?

A. Yes, sir; about the same all the time, only drawing closer to each other's course."

Both the pilot of the *Delaware* and her master say that the relative situation of the vessels was such that they could not port after rounding the buoy and still pass astern of the pilot-boat, but that, on the contrary, such manœuvre would have resulted in collision with the latter (pp. 39, 116, 117, 119, 122).

It thus appears that there was nothing in the course or signals or manœuvres, or in the relative situation of the vessels, to justify the pilot of the *Talisman* in supposing that the steamship would go under his stern, or stop, as she was not showing any sign of doing either; and the presumption that a vessel bound to keep out of the way of another crossing, will do so, by passing under the stern, only applies where it clearly appears there is nothing in the way of her doing so, and the visible indications are such as fairly lead to the supposition that she will do so. If Captain Winnett's own story were to be believed, then the only real indication in the case, of the *Delaware's* intention, would be that shown by her alleged swing to port as under a starboard helm, which would show she was intending to pass *ahead*.

The rule that a preferred vessel may presume the other one will perform her duty and keep out of the way by going astern, does not apply where all the indications are that the other vessel is not doing so, but is, on the contrary, refusing to answer signals, keeping up her speed and pointing so as to cross ahead, at the risk of collision.

In such case, Article 18 becomes applicable, and the preferred vessel must slacken speed.

Thus, in the *Hercules*, 51 *Fed.*, 452, where the *Hercules*

had the *Brandon* on her starboard side, and was not answering the signals of the *Brandon*, and was seen to be following the erroneous course of attempting to cross ahead of the *Brandon*, the *Brandon* was held in fault for not obeying Article 18.

SIMONTON, *J.* (at p. 458), said:

"The *Brandon* coming down the stream and *signalling to the Hercules*, put her helm aport, but she saw that the *Hercules* instead of going to starboard was crossing her path. She saw and recognized the error the *Hercules* was committing. It then became her duty, notwithstanding this error, to use every precaution to avoid collision. *The Maria Martin*, 12 *Wall.*, 31. *This special circumstance rendered a departure from the rules necessary.*"

In the *John S. D'Arcy*, 29 Fed. Rep., 644, 648, this argument was advanced on the part of the preferred vessel, and Judge BROWN, in holding her in fault for failing to observe Article 18, said:

"If the ferryboat [preferred vessel] had a right to expect that the tug would go out into the stream, *the fact that the tug was taking the contrary course was apparent, and it was clear that she was persisting in this course when she could no longer avoid the ferryboat by any change that she could make*, while the ferryboat could still, by stopping in time, avoid collision. The proof shows that the *Darcy*, at her moderate speed, would have stopped dead in the water in going a little over two lengths. The considerable time that elapsed after the *Darcy's* first whistle leaves no doubt in my mind that the *Darcy* might have stopped completely after immediate danger of collision was manifest. *She was not justified in running upon the tug because the tug did not perform her duty; she should have stopped in time, under old Rule* 21."

Risk of collision, under the circumstances, was necessarily obvious (*The Frisia*, 24 Blatchf., 40, 48–49). The *Delaware* was seen steadily approaching with unabated speed on a course substantially at right angles to that of the *Talisman*, pointing ahead of her, and if any observations had been made, it would have been seen, as shown on the diagram, that the bearing of the *Delaware* from the *Talisman's* bow made almost no change (Flannery, 68). This is one of the plainest indications of risk of collision.

In the proceedings of the International Marine Conference, Vol. 3, page 458, under the topic of "Steering and Sailing Rules," a rule was established for ascertaining the risk of collision, and providing when such risk should be deemed to exist.

The first provision under the steering and sailing rules there adopted is as follows:

"PRELIMINARY.—Risk of collision.

Risk of collision can, when circumstances permit, be ascertained by carefully watching the compass bearing of an approaching vessel. *If the bearing does not appreciably change, such risk should be deemed to exist.*"

This proposition was embodied in the statute enacting the rules proposed by the maritime conference (to take effect upon proclamation of the President), 26 *Statutes at Large*, 320.

In The *North Star*, 22 *U. S. App.*, 242, 259, TAFT, *Circuit Judge*, in pointing out that where the vessels are only five minutes apart it is the duty of each to note with care the bearing of the other, referred to the significance of a steady bearing of the other vessel at a certain point, as follows:

"Says Marsden in his 'Law of Collisions at Sea' (3d Ed.), at page 350: 'In practice one of the most usual indications of risk of collision is that the approaching ship remains upon the same bearing from the observing ship for an appreciable length of time.' In Article 16 of the Act of August 19, 1890, to prevent collisions at sea (26 Stat., 320, 326, C. 802), appears the following: 'Risk of collision can, when circumstances permit, be ascertained by carefully watching the compass bearing of an approaching vessel. If the bearing does not appreciably change, such risk should be deemed to exist.' The act in which this language appears is not, as we have found, applicable to the collision in this case, but it is evidently only declaratory of a well understood rule of prudent navigation, and is useful here as such."

But apart from this mode of ascertaining the risk, it was so plain to the senses that everybody on either boat, except Capt. Winnett, saw it, and some took what means

they could for their own safety, while he went stubbornly on, doggedly persisting in his supposed right of way, although it is admitted in the libel that risk of collision existed when he blew his second whistle signal.

Correcting the erroneous findings that the collision occurred on the southerly side of the channel, and that the pilot of the *Talisman* was justified in supposing the *Delaware* was going to pass under his stern, we have the case of two vessels crossing at nearly right angles, approaching each other without change of course or speed, for about four minutes before collision, and meeting without either abating her speed until collision was inevitable, and without the *Talisman* abating her speed at all, each one proceeding on her course in the effort to pass ahead of the other. In such circumstances, the previous decisions of the Court would apparently lead to the conclusion that both vessels were in fault.

1. ARTICLE 18, REQUIRING EVERY STEAMSHIP WHEN APPROACHING ANOTHER SHIP SO AS TO INVOLVE RISK OF COLLISION, TO SLACKEN HER SPEED OR STOP AND REVERSE, IF NECESSARY, APPLIES TO THE PREFERRED VESSEL, ENTITLED TO KEEP HER COURSE, UNDER ARTICLE 16.

The *Washington and* the *Gregory*, 9 *Wall.*, 513.
The *E. A. Packer*, 140 *U. S.*, 360.
The *Favorita*, 18 *Wall.*, 598.
The *Cayuga*, 14 *Wall.*, 270.

In The *Washington* and the *Gregory* (*supra*), the facts were singularly like the present. The preferred vessel, the *Gregory* (a ferry-boat), was crossing the course of the *Washington*, and gave a whistle signal, indicating that she was intending to pass ahead. This was not answered by the *Washington*, and thereupon, there being risk of collision, the ferry-boat whistled a second time. No answer was received to the second whistle, and still the ferry-boat kept on, and finally rang the jingle-bell, for more speed, and without slackening or stopping, proceeded, until the vessels were in collision, although it was apparent to the pilot of the ferry-boat that the *Washington* was not per-

forming her duty of keeping out of the way. Both vessels were held in fault. BLATCHFORD, *J.*, 2 Benedict, 226, 235, said:

"And even if it should be admitted that the ferry-boat [preferred vessel] adopted her new course at such a distance from the *George Washington* as to make it a course which she was entitled to keep, under Article 18, as against the duty of the *George Washington*, under Article 14, to keep out of her way as well after such change of course as before, still it was the duty of the ferry-boat, under Article 16, to have slackened her speed, and stopped her engine, and reversed it. She did not do so. She gave her signal, ported her helm, received no response to her signal, kept on at her speed, gave another signal, received no response to it, still kept on, and then rang the jingle-bell to put on all the steam that could be got, which was done, and the crash came. Greater and more culpable recklessness in navigation cannot well be conceived. *At the time she whistled, because there was risk of collision, it was her duty, because there was such risk, to have slowed, if not to have stopped her engine and reversed it. When she whistled a second time, if not before, it was her duty to have stopped her engine and reversed it.*"

Further (at p. 236), Judge BLATCHFORD said:

"It is very plain, on the evidence, that each boat was attempting to head off the other. Neither would give way to the other. Whether each failed to hear the signal or signals given by the other or not, each saw plainly what the other was attempting to do, and each blindly and recklessly rushed into the impending peril. Each violated two of the clearly prescribed rules of navigation in regard to steam vessels, and each must bear the consequences of its acts."

The decision was affirmed at circuit, and on appeal to this Court, where Mr. Justice FIELD, in delivering the opinion of the Court (9 Wall., 513, at p. 516), said:

"The *Washington* was moving at the rate of twelve miles an hour, going down the river, about two hundred yards from the piers on the New York side. The *Gregory* was moving at the rate of between nine and ten miles an hour, crossing the river diagonally. Neither of the vessels paid any attention to the signals given by the other,

"It is argued the words 'shall keep her course,' mean, that she shall maintain her speed, and English cases are cited to the effect that the rule does not imply that the vessel shall *maintain the same speed*. If this is all that is meant in the cases cited, and we so read them, we have no reason to disagree with them, and they do not in the slightest degree impugn our reasoning. But if the contention is, and if those cases must be understood as holding that a vessel whose duty it is to keep her course, complies with that duty by reversing her engines, and ceasing to move at all, we are unable to concur in such a view."

This passage has been thought to mean that the Court intended to lay down the principle that the preferred vessel need do nothing but maintain her course and speed until collision, no matter how obvious the risk may be, and that if she does so, she will not be held in fault.

Such is substantially the decision in the present case.

This view of the decision in the *Britannia* we submit is erroneous. The passage quoted from the opinion of Mr. Justice SHIRAS simply lays down, in other words, the principle which was announced by the Court, in Mr. Justice BROWN'S opinion, in the *E. A. Packer* (*supra*), where he said:

"The duty of the *Wolverton*, preferred vessel, was clear. She was bound (1) to keep her course; and (2) to check her speed, if there was apparent risk of collision; and (3) if necessary to avoid immediate danger, to stop."

That statement of the law virtually says, that the duty to slacken speed, where risk of collision is involved, arises under Article 18, but that the duty to stop and reverse, is not put on the preferred vessel, except under Article 23, "in order to avoid immediate danger."

It seems, therefore, that the difficulty in the case of the *Britannia*, and misapprehensions that have arisen from it, were due to the peculiar facts in that case, and not to any change in the governing principles, which had formerly been announced by the Court.

The *Britannia* was soon followed by a further decision under the same rules, that of the *Breakwater*, 155 U. S., 252. A ferryboat left her slip in New York bound for

Jersey City. The *Breakwater*, arriving from sea, was proceeding northward along the line of the New York docks, about 400 feet distant therefrom, and about opposite Barclay street, about 880 feet southward from Chambers street. She was going at the rate of six miles an hour, against a strong ebb tide and northwest wind. As the *Pavonia* moved slowly out under a hard aport wheel, her bow swung southerly down the river with the force of the wind and tide. *She sounded a single whistle, and the Breakwater replied with the same.* The *Pavonia* then put her engine to full speed and made another blast, to which the *Breakwater* made the same reply. Meanwhile the *Pavonia* had recovered from her downward swing and swung up the river on her course. When the *Breakwater* sounded her first whistle her engines were immediately stopped. When she sounded her second her engines were put full speed astern. The stem of the *Breakwater* was in collision with the port side of the *Pavonia*. *Breakwater* was alone in fault, and the *Pavonia* was excused for failing to slacken her speed, because the effect of so doing would have caused the tide to carry her down upon the other vessel.

Mr. Justice BROWN, in delivering the opinion of the Court (at *p.* 264), said:

"No fault is to be imputed to the *Pavonia* for her failure to stop and reverse, since it is quite obvious that if she had slackened speed her tendency to sag down the river would have been greatly increased, and she would practically have been at the mercy of the wind and tide. Her only safe course was to do precisely as she did, put her wheel hard aport and her engine at full speed astern. *The duty to slacken speed* manifestly does not apply where the effect would be to carry the steamer bodily down the current upon another vessel which is trying to avoid her."

Although this case reaffirms the *Britannia*, 153 *U. S.*, 130, as to the general duty of a preferred vessel navigating under the starboard hand rule to keep her course and speed, it plainly implies that *the duty to keep speed does not necessarily mean the same speed; and that the preferred*

vessel should slacken speed where risk of collision is involved, and stop and reverse in face of immediate danger.

The duty of the preferred vessel in starboard hand cases to slacken speed to avoid risk of collision, and to stop and reverse, to avoid immediate danger, has been repeatedly affirmed and reaffirmed in the Second Circuit.

This principle has been repeatedly affirmed and reaffirmed in this Circuit.

In the *Santiago de Cuba*, 10 *Blatchford*, 444, that steamer had the *Brunette* on her starboard hand and was held in fault for failing to keep out of the way. The *Brunette* was also in *fault for not stopping, in the face of evident risk* of collision.

WOODRUFF, Circuit Judge (at *p.* 455), said:

"Nor am I satisfied that the *Brunette*, in not slowing, stopping and backing, was not hereself in like fault with the *Santiago de Cuba*. If, instead of porting her wheel, when she saw the danger, she had done this, and especially if, besides and before porting, she had slowed, stopped and reversed, it is greatly probable that no collision would have happened. True, under the general rule, she was entitled to keep her course, *but the time did come when she saw danger of collision, and when the rule, that 'every steamship, when approaching another ship, so as to involve risk of collision, shall slacken her speed, or, if necessary, stop and reverse,' became applicable to her, also.* She did see the danger. She did port, in order to escape. If, in due season, she had slowed, stopped and reversed, it is hardly possible that the two would have collided. A delay equivalent to a few seconds would have permitted the *Santiago de Cuba* to go clear. As already observed, these rules are not framed as the mere rule of obligation between the two colliding vessels. They are not based upon the idea that one may say to the other—you are in fault, and I will, therefore, do as I will. The interests of human life and the protection of property demand that in circumstances of peril, the dictates of the highest prudence, and especially all just and peremptory rules of precaution, shall be observed by both, and their disregard shall bring both under condemnation. Had the *Brunette* made even an ineffectual endeavor, it would have been credited to her; but, on the contrary, she rushed, without any effort to check her full speed, upon the destruction which she encountered."

In the *Titan*, 23 *Fed. Rep.*, 413, that vessel was proceeding up the North River, on a line with the westerly shore, having a car float on her starboard side, which obscured the green light. She, however, carried her range lights and towing lights, which were visible over the top of the float. The *Hills* was bound from the slip at the foot of Twenty-third street for Jersey City. Her pilot saw the white lights above the car float, but assumed erroneously that they were on a vessel bound down instead of up the river. She accordingly proceeded directly on her course until close upon the float, when *in extremis* she hard-ported, but did not stop or back. Both vessels were in fault.

WALLACE, Circuit Judge (at p. 416), said:

"While ordinarily a vessel has a right to assume that another vessel is not derelict in the observance of the rules of navigation, *this presumption is not to be carried so far as to exonerate her from ordinary precautions on her own part or to excuse her from the consequences of a mistake, when by a slight exertion and without any peril to herself or to other vessels she could certainly avoid hazard.* There was ample room, plenty of time, and no intervening obstacles in the way of perfect safety if the *Hills* slackened speed while she was passing the *Gould*. After this it was obvious that the *danger of collision with the Titan was imminent, and she should have been stopped and reversed.*"

In the *Catskill*, 38 *F. R.*, 367, the steamer, while coming down the North River and approaching her wharf in New York City, was run into by the ferryboat *Baltimore*, bound from New York across the river. The course of the *Catskill* lay direct for her pier, which took her directly across the bows of the *Baltimore*, which was nearing her slip in New York on her trip from Jersey City. The intention on the part of the *Catskill* to keep her course was manifested by her disregarding the repeated signals of the *Baltimore*. The *Baltimore* did not reverse until within 200 feet of the place of collision. Both vessels having been found in fault in the District Court (34 *Fed. Rep.*, 660), the *Baltimore* appealed. Held, that the *Baltimore* was in fault, although she had the right of way.

LACOMBE, Circuit Judge (*p.* 368), said:

"The District Judge has found that the course of the *Catskill* was plain, nearing the shore generally on a direct line from her position when first sighted to her wharf, and also on conflicting evidence that the *Baltimore* did not reverse until within 200 feet of the place of collision. Under such a state of facts the *Baltimore* was clearly in fault. Her navigator was not surprised by any sudden indication that another craft, which he supposed intended to obey the rules, meant to violate them. On the contrary, with a very plain intimation that the other vessel was willfully or heedlessly continuing on a course which made collision imminent, he kept on, in the hope that she would at the last moment discover her error and seek to rectify it. For thus keeping on until the safety limit was reached and past, the District Judge held the navigator of the *Baltimore* in fault, and his decision is affirmed."

It is thus apparent that the Circuit Judges felt the *Britannia* and *Breakwater* cases announced a new rule, for their decision in the present case virtually overrules the decisions of two of the members of the Court in the *Titan* and *Catskill* (*supra*), which are not distinguishable in principle or on the facts from the case at bar.

The decision also virtually overrules a long line of decisions by Judge BROWN in the Southern District of New York, and many decisions in other districts holding the preferred vessel in fault for failing to slacken speed or stop, in face of obvious risk of collision caused by the other vessel wrongfully or heedlessly persisting in an improper course.

The *Aurania*, 29 Fed. Rep., 98.
The *John S. Darcy*, 29 Fed. Rep., 644.
The *Fanwood*, 28 Fed. Rep., 373.
The *Fred. W. Chase*, 31 Fed. Rep., 91.
The *Greenpoint*, 31 Fed. Rep , 231.
Wells vs. *Armstrong*, 29 Fed. Rep., 216, 218.
The *Margaret J. Sanford*, 30 Fed. Rep., 714.
The *Rockaway*, 38 Fed. Rep., 856.
The *Rio Grande*, 38 Fed. Rep., 849.
The *Leonard Richards*, 38 Fed. Rep., 767.
The *America*, 32 Fed. Rep., 845.
The *Baltimore*, 56 Fed. Rep., 127.

The *Stone*, 49 Fed. Rep., 475.
The *Don Juan*, 50 Fed. Rep., 618.
The *Jackson*, 58 Fed. Rep., 607.

It cannot be said the *Talisman* obeyed the 18th Article by simply going ahead at a less speed than the *Delaware*. The mandate of the rule is not to go at something less than full speed, but is "to slacken speed," *i. e.*, to reduce the speed at which she is going when the risk of collision arises, if reducing it will obviate or lessen that risk. In the present case to have slackened merely, would have avoided the risk and the collision. It was testified (p. 119) and not denied that if the *Talisman* had slowed down or stopped when the *Delaware* was three lengths (say 1,000 feet) or less away from the place of collision, about where she was when the *Talisman* sounded her second single blast whistle signal, there would have been no collision. Moreover, such slackening would have kept the *Talisman* back so that at a later moment she could have used a starboard helm, as her master wished to do (pp. 27, 33), and thus have passed under the *Delaware's* stern in safety. Being, as she was, head to the tide, there was no reason why she should not have done so.

The *Galatea*, 92 U. S., 439.
The *Osceola*, 50 Fed., 326.
Spencer, Marine Collisions, 271, n. 3.

The decision in the present case, holding the *Talisman* was justified in keeping up her speed in face of obvious risk of collision, is wholly at variance with the English cases. As these are International Regulations, uniformity of decision under them is highly desirable for the preservation of life and property.

In The *Beryl*, 9 P. D. 137, 138, BRETT, *M. R.*, stated the English construction of the design and bearing of the rules in starboard hand cases as follows:

"I take it that the basis of the regulations for preventing collisions at sea is that they are instructions to those in charge of ships as to their conduct; and the Legislature has not thought it enough to say, 'We will give you rules which shall prevent a collison;' they have gone further

and said that 'for the safety of navigation we will give you rules which shall prevent risk of collision.' It is not enough if you do only that which will apparently prevent a collision; we will give you rules which shall regulate your conduct, not merely for the purpose of preventing a collision, but for the purpose of preventing even a risk of collision."

In dealing with the bearing of the 18th Article, upon the 16th and 22d, the Master of the Rolls (pp. 139-141) said:

"Therefore, the consideration must always be in these cases, not whether the rule was in fact applicable, but were the circumstances such that it ought to have been present to the mind of the person in charge that it was applicable. If that be so, in this case, we have got to deal with two different rules under different circumstances. The first, Article 16, is this: 'If two ships under steam'—it is not 'two steamships,' therefore, but 'two ships under steam,' that is, with their steam up—'are crossing so as to involve risk of collision, the ship which has the other on her own starboard side shall keep out of the way of the other.' Then, if the circumstances of those two ships which are under steam are such that the persons in charge of them ought to see that risk of collision is involved, the ship which is on the starboard side is bound to do something to keep out of the way of the other. Another rule of interpretation of these regulations is (the object of them being to avoid risk of collision) that they are all applicable at a time when the risk of collision can be avoided—not that they are applicable when the risk of collision is already fixed and determined. We have always said that the right moment of time to be considered is that which exists at the moment before the risk of collision is constituted. The words are not, 'If two ships under steam are crossing with a risk of collision,' but 'are crossing so as to involve risk of collision,' that is, the moment before there was a risk of collision. Here, the duty of the *Abeona* was to follow whichever maneuver she chose to select which would keep her out " of the way of the other, so as to avoid risk of collision. But then there is Article 22 which applies to the conduct of the other vessel. It was suggested to us to day that 'keep her course' meant keeping her course at the same pace at which she was going before she was called upon to obey this rule. But keeping her course means that she is to keep on the same direction as before; it has nothing to

do with the question of speed. Then we come to another rule, Article 18, which does not in any way modify, clash with or require to be construed at the same time as the other rules. It is a wholly independent rule. This rule in the case of two steamers approaching each other, applies to both of them. The former rules apply to one of the two vessels; this one applies to both, if they are both steamers—'Every steamship, when approaching another ship so as to involve risk of collision, shall slacken her speed or stop and reverse if necessary.' That rule in my opinion, like all the others, applies more particularly to the moment before the risk of collision is constituted and exists. It is at a time when the action of both steamers is such as to involve risk of collision. At that moment of time, if what they are doing involves a risk of collision, they are both to slacken their speed. It applies to each of them. But it may be that the condition of things just before the moment when the risk of collision is to be constituted is such that the slackening will not avoid that risk of collision, and that it requires another maneuver, namely, that of stopping and reversing, and then they must stop and reverse, either one or the other, or both. That, again, is an instruction as to the conduct of men, and it cannot be that they are to do that thing merely because it is proved afterwards that there was a risk of collision, or if there was risk of collision about to be constituted. It must apply if the circumstances are such that an officer of ordinary skill and care would be bound to come to the conclusion that if the ships continue to approach each other there will be risk of collision."

2. THE *Talisman* INFRINGED ARTICLES 23 AND 24 IN NOT STOPPING AND REVERSING TO AVOID IMMEDIATE DANGER.

Inasmuch as a collision occurred between the vessels, there must have been not only risk of it, but immediate danger of it, an appreciable time before the blow; and as the *Talisman* did not slacken or stop or reverse in the presence of that danger, she did not comply with the regulation.

The duty of vessels entitled to keep their course, under other rules of navigation, to adopt precautions to avoid a collision by departing from the rules in the presence of obvious danger, has been repeatedly affirmed in

this Court, in the lower courts, and in the courts of England.

In The *Sunnyside*, 91 *U. S.*, 208, a sailing vessel was condemned for strictly adhering to the rule and running down a steamtug which lay motionless upon the water, although the latter was conceded to be in fault for not getting out of her way. Mr. Justice CLIFFORD said (p. 218):

"Negligence more manifest, culpable or indefensible, in view of the circumstances, is seldom exhibited in controversies of this character, and the only excuse offered for it is that the 18th sailing rule provides that where one of two ships is required to keep out of the way, the other shall keep her course, entirely overlooking the fact that the mandate of that rule is declared by the rule itself to be subject to the qualifications of Rule 24, that in obeying and construing the rules, due regard must be had to all dangers of navigation, and to any special circumstances which may exist in any particular case, rendering a departure from the rule necessary, in order to avoid immediate danger."

Further along in the opinion (p. 222) he says:

"We prefer to rest the decision upon the ground that it was the duty of the bark, *in view of the special circumstances*, to have put up her helm and have gone to the right, or to have put it down and suffered the steamtug to move past in safety.

"Cases arise in navigation where a stubborn adherence to a general rule is a culpable fault, for the reason that every navigator ought to know that rules of navigation are ordained not to promote collisions, but to save life and property by preventing such disaster. * * * *No vessel is justified by pertinacious adherence to a rule for getting into collision with a ship which she might have avoided, which is the exact case before the Court"* (1 *Parsons Shipping and Admiralty*, 580). * * *

"(P. 223). Sailing vessels on the larboard tack and close hauled are in general required to keep their course, but Dr. Lushington holds that such a vessel is not justified in pertinaciously keeping her course, even though the vessel she meets is on the starboard tack with the wind free. 'Where practicable,' said that learned Judge, 'such a vessel is bound to take the necessary precautions in avoiding the collision, although the other vessel is acting wrongfully in not given way in time,' and in that case he

held that both vessels were in fault (The *Commerce*, 3 W. Rob., 287; *Handayside* v. *Wilson*, 3 C. & P., 530)."

In *Crocket* vs. *Newton*, 18 How., 581, 583, Mr. Justice CURTIS, in stating the rule for a sailing vessel meeting a steamer to keep her course, added:

"This rule should not be observed *when the circumstances are such* that it is apparent its observance must occasion a collision."

In *Wilson* v. *Canada Shipping Co.*, 2 App. Cas., 389, the Privy Counsel held that obvious risk of collision made a case of particular circumstances, which required a preferred said vessel to depart from the regulation requiring her to keep her course.

Sir ROBERT PHILLIMORE, delivering the opinion of the Court (at p. 393), stated it was

"perfectly clear that though the port-tacked vessel is to get out of the way of the starboard-tacked vessel, and the starboard-tacked vessel is to keep her course, *that rule of navigation does not mean, and never has been construed to mean, that the starboard-tacked vessel is to obstinately continue on her course, when she sees that in the particular circumstances, by a variation from it, she can avoid a collision.* Their lordships, after consulting with their Nautical Assessors, are of opinion * * * that the *Underwriter* (preferred vessel) ought to have * * * put her helm down at an earlier period than she did, that is, at the moment when the hailing first reached her, which it is clear she did not do, and which, if she had done, would have avoided the collision. She would have brought her head to the wind and there would have been no collision."

And for the omission of the preferred vessel to make this maneuver, in view of the obvious risk of collision, she was held in fault.

In The *Tasmania*, 15 App. Cas., 223, 225, Lord HERSCHELL, commenting upon the duty of the preferred vessel, in the face of immediate danger, to refrain from persisting on her course (p. 225), said:

"Although having regard to the relative position of the two vessels, it was the duty of the *Tasmania* to keep her

course, it is clear that she would not be justified in blindly proceeding in that course, if it was manifest that disaster must result from it. It is provided by Rule 23 that in obeying and constructing the rules *due regard should be had to any special circumstances which may render the departure from them necessary in order to avoid immediate danger. As soon, then, as it was, or ought, to a master of reasonable skill and prudence, to have been obvious that to keep her course would involve immediate danger, it was no longer the duty of the master of the Tasmania to adhere to the 22d rule. He was not only justified in departing from it, but bound to do so,* and to exercise his best judgment, and avoid the danger which threatened."

In The *Gallileo*, 24 *Fed. Rep.*, 386, BROWN, *J.*, said:

"In not observing this rule, but keeping on at full speed instead, the burden of proof is upon the tug, in order to clear herself from fault, to satisfy the Court beyond reasonable doubt that at the time when this risk of collision was first apparent, slackening speed or stopping would have made no difference."

And in The *Jay Gould*, 19 *Fed. Rep.*, 765, where it was doubtful whether stopping by a tug would have avoided a collision primarily due to the fault of another vessel, Mr. Justice BROWN, then District Judge (p. 768) said:

"As it is substantially agreed that the propeller was only about 600 feet off when her green light was exhibited, it is at least open to doubt whether the action of the tug did, in fact, contribute to the collision, and whether any maneuver upon her part could have prevented it. The gentlemen by whom I have been assisted upon the argument advise me that, in their opinion, the vessels were then too close together for any efficient action upon the part of the tug. But to exonerate her for her departure from the rules, I apprehend that it must be shown with reasonable certainty that such departure could not have contributed to the disaster which followed. The rule is entirely well settled, both in this country and in England, that the violation of any statutory requirement will be presumed to have contributed to the collision. Thus, in the case of The *Pennsylvania*, 19 *Wall.*, 125, where a bell was rung by a sailing vessel under way in a fog, when the rule prescribed that a fog-horn should be blown,

Mr. Justice STRONG, speaking for the Supreme Court, observes:

"'That when, as in this case, a ship at the time of a collision is in actual violation of a statutory rule intended to prevent collisions, it is no more than a reasonable presumption that the fault, if not the sole cause, was, at least, a contributory cause of the disaster. In such a case the burden rests upon the ship of showing not merely that her fault might not have been one of the causes, or that it probably was not, but it *could not* have been. Such a rule is necessary to enforce obedience to the mandate of the statute * * *. The evidence in the present case leaves it uncertain whether, if a fog-horn had been blown on the bark, it would not have been heard sooner than the bell was heard, and thus earlier warning have been given to the steamer—seasonable warning, to have enabled her to keep out of the way. * * * It may be assumed, therefore, that the Legislature acted under the conviction that a fog horn could be heard a greater distance than a bell, and required the use of one rather than that of the other for that reason. To go into the inquiry whether the Legislature was not in error; whether, in fact, a bell did not give notice to the steamer that the bark was where she was as soon as a fog-horn would have done, is out of place. It would be substituting our judgment for the judgment of the law-making power.'

"The obligation to slacken speed whenever by a false maneuver on the part of another vessel a steamer incurs the danger of collision, has been enforced in numbers of cases and under circumstances very similar to those which existed in the case under consideration."

In The *Hercules and* The *Brandon*, 51 *Fed.*, 452, the vessels were on crossing courses, the *Hercules* having the *Brandon* on her starboard side. The *Hercules*, instead of going under the *Brandon's* stern, attempted to cross her bow, and this attempt was seen by those in charge of the *Brandon* for a minute or two before the collision.

The *Hercules* was in fault for not keeping out of the way; the *Brandon* for not changing her course or stopping, upon the ground that a vessel has no right to run into collision for the enforcement of her right of way.

SIMONTON, *J.*, said (at p. 454):

"The green light of the *Hercules* was the only one visible, almost directly off the bow of the *Brandon*. This

indicated that the *Hercules* was every minute getting nearer the wharves. The course of the *Brandon* was constantly diminishing her distance from them. It also showed that the *Hercules* was getting almost directly ahead of the *Brandon*—in her path. A change of the wheel of the latter, from port to starboard, would have avoided all risk of collision. If no change was made, a collision was inevitable. The *Brandon* kept on her course without any change whatever. In this she violated Article 23. The duty is to avoid the collision by observing the rules primarily, by departing from them, if necessary, to avoid danger. The master of the *Brandon* says that he saw the green light of the *Hercules* for two minutes before the collision. If he had starboarded his wheel he would have passed astern of her. He did not do this, and was in fault. He had no right to run into collision for the enforcement of his right of way (The *C. R. Stone*, 49 *Fed. Rep.*, 475). Collisions involve the destruction of life, as well as of property. It is for the interest of humanity that they be prevented. All parties concerned in them should be held to rigid accountability. In order to escape all responsibility for a collision, one must be wholly without fault. He must not only be guiltless of any error, which may bring about risk of collision, but he must also take all necessary steps to avoid a threatened collision, if it be possible. It is ordered that costs and damages in this case be divided between the libelant and respondent."

The near presence of buoys interfering with the *Delaware's* maneuvers rendered special vigilance and attention necessary on the part of the *Talisman*, as possible interferences with navigation are in the nature of special circumstances, which may make a departure from the rules by the preferred vessel necessary, under Articles 23 and 24, to avoid immediate danger.

This was pointed out especially in the cases of the *Louise*, 8 *U. S. App.*, 138, where a third vessel crossed between the *Louise* and the *Virginian* shortly before the collision, and in the *Hercules and the Brandon*, 51 *Fed.*, 452, where the vessels were navigating in the neighborhood of the wharves. In the latter case, at page 454, Judge SIMONTON said:

"The *Brandon* coming down the stream and signalling to the *Hercules*, put her helm aport, but she saw that the *Hercules*, instead of going to starboard, was crossing her

path. She saw and recognized the error the *Hercules* was committing. It then became her duty, notwithstanding this error, to use every precaution to avoid collision (The *Maria Martin*, 12 *Wall.*, 31). *This special circumstance rendered a departure from the rules necessary* She was in the close vicinity of wharves on her starboard side. Great caution, therefore, was necessary."

It was not important to the *Talisman* or to the pilot-boat whether they reached the station outside the outer Black Can Buoy a few minutes earlier or later. It had been thick shortly before the collision, and at the moment of collision had begun to rain again and threatened to be thicker. The pilot of the *Delaware* therefore desired to enter the channel and pick his way along up by the buoys. The *Talisman* was head to the tide, and could have stopped or slowed without difficulty.

The channel was marked out specially for ocean-bound steamships and ships of great draught. The pilot testified that tugboats quite often give the right of way to steamers in the channel, and he expected in the present case the *Talisman* would do so. Legislation has finally been obtained from Congress giving an absolute right of way in the channels to ocean steamships and ships of great draught. The River and Harbor Act of 1894 (Statutes of 1893, 1894, 2d Session, 53d Congress, Chapter 299, Sec. 2, p. 360), provides as follows:

"*It shall be unlawful* for any person to engage in fishing or dredging for shellfish in any of the channels leading to or from the harbor of New York, *or to interfere in any way with the safe navigation of these channels by ocean steamships and ships of great draught.*

"Any person or persons violating the foregoing provisions of this section shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine or imprisonment, or both, such fine to be not more than $250 or less than $5, and the imprisonment to be not more than six months, nor less than thirty days, either or both united, as the Judge before whom the conviction is obtained shall decide."

While this law was not in force at the time of the collision, all the reasons for its enactment were.

The attention of those in charge of the navigation of large vessels approaching or passing through the channels is naturally, to some extent, taken up with making out the buoys, with calculations as to the force and direction of tide, with the direction of the ship along the line of the buoys, and generally with the management of the ship in narrow waters. These are matters known, or which ought to be known, to masters of small vessels, whose business may take them across the channels; and Congress has apparently considered these matters as "special circumstances," within the meaning of Articles 23 and 24 of the Regulations, justifying a *suspension* of the privileges and preferences, which such vessels would otherwise have by Regulations, when meeting or crossing ocean steamships and ships of great draught in the Channel.

This legislation virtually sanctions Pilot Harpenau's view, that the circumstances in which he was endeavoring to enter the Channel were such, that the *Talisman* ought to have slowed or stopped and let him pass up the Channel and cross her bow.

3. THE FAILURE OF THE *Talisman* TO SLACKEN HER SPEED WHEN THE RISK OF COLLISION BECAME INVOLVED, OR TO STOP AND REVERSE, TO AVOID IMMEDIATE DANGER, PLACES THE BURDEN OF PROOF UPON HER TO SHOW SPECIAL CIRCUMSTANCES JUSTIFYING HER DEPARTURE FROM THE REGULATIONS, AND IN THE ABSENCE OF SUCH PROOF, THE LAW PRESUMES HER INFRACTIONS OF THOSE REGULATIONS CONTRIBUTED TO THE COLLISION.

The *Memnon*, 6 Asp. Mar. Cas., 488.
The *E. A. Packer*, 140 U. S., 360, at p. 369.
The *Galileo*, 24 Fed., 386.
The *Jay Gould*, 19 Fed., 765, 768.
The *Pennsylvania*, 19 Wall., 125.

The default of the *Delaware's* pilot was no excuse for the *Talisman*.

The *Maria Martin*, 12 Wallace, 31.
The *America*, 92 U. S., 432.

Nor does the law regard degrees of fault where a regulation is infringed.

In the *Kendive*, 5 A. C., 876, 894, BLACKBURN, *L. J.*, said:

"He (the master) at once took in the situation, and was aware that there was risk of a collision, and that it was imminent, if not inevitable, and he acted with great promptitude and skill (by altering the helm) so as to alleviate the violence of that inevitable collision. But he did not stop and reverse, nor even slacken his speed, and there he departed from the course prescribed by regulation 16; nor was there anything in the circumstances rendering a departure from the rule necessary in order to avoid immediate danger."

In the *Arratoon Apcar* (15 A. C., 37, 41) (a meeting case), where the fault was not slackening speed in good time, Lord MacNaghten said:

"The error on the part of the *Arratoon Apcar* may seem venial compared with the misconduct of those on board the *Hebe*. But their lordships have no power to absolve a vessel which infringes the regulations for preventing collisions at sea, from the consequences prescribed by statute, unless a plea of necessity is made out."

The fact that the District Court and the Circuit Court of Appeals both decided against the *Delaware* is no bar to a re-examination of the essential facts by this Court.

In the *Ariadne*, 13 *Wall.*, 475, the argument was urged upon the Court that the conclusions of fact below should not be disturbed, but Mr. Justice SWAYNE, in delivering the opinion of the Court, says (at p. 479):

"We are not unmindful that both the Circuit and District Court came to a conclusion different from our's as to the alleged fault of the steamer. Their judgments are entitled to and have received our most respectful consideration. Their concurrence raises a presumption, *prima facie*, that they are correct. Mere doubts should not be permitted to disturb them. But the presumption referred to may be rebutted. *The right to appeal to this Court is a substantial right, and not a shadow. It involves examination, thought and judgment.* Where our convictions are clear, and differs from those of the learned Judges below, we may not abdicate the performance of the duty which the law imposes upon us by declining to give our own judgment effect (*The Quickstep*, 9 *Wall.*, 669)."

The conclusion from this examination of the facts and the law appears to be plain that the *Talisman* should be held in fault, contributing to the collision for violating Articles 18, 23 and 24. These articles were inserted in the statute as cumulative precautions against collision, and for the preservation of life and property. Their very presence in the law contemplates the case that a vessel bound to keep out of the way, may, from some improper navigation, fail to make the maneuvers necessary to do so. Then the preferred vessel, seeing that needed precautions are not being taken by the vessel which should keep out of the way, is herself required to take precautions, namely, to slacken speed or stop and reverse if necessary, and in many cases, as in the present, lives and valuable property may be lost if the preferred vessel in such case fails to adopt the cumulative precautions required of her by the statute. To say that in such a case the fault of the preferred vessel is a fault *in extremis*, for which she shall not respond, is virtually to abrogate these articles, especially Article 18, since the extremity of the preferred vessel is due to her previous fault in failing to slacken when the risk of collision became involved.

In the presence of immediate and impending danger there is no absolute right of way. Both vessels are then bound to give way, and, if necessary, to depart from the usual rules, if such departure will plainly avoid the collision, regardless of the original right of way or special privileges of either; and failing to do this, both should be held liable.

The principle stated in the *Sunnyside*, 91 U. S., 208, 210, by Mr. Justice CLIFFORD cannot be too strongly emphasized.

"Rules of navigation are adopted to save life and property, and they are required to be observed and are enforced to accomplish the same beneficent aim and not to promote collisions. Consequently, they have exceptions, and no party ought ever to be permitted to defend or excuse a plain error by invoking a general rule of navigation, when it is clear that the case falls within an admitted exception."

II.

If this case comes under the channel rule, the *Talisman* was in fault for failing to be and to have her tow on the southerly side of the channel.

Libelants contend that because the collision occurred in the channel, Article 21, relating to channel navigation, had become operative.

This article provides:

"In narrow channels, every steamship shall, when it is safe and practicable, keep to that side of the fairway or mid-channel which lies on the starboard side of such ship."

It seems doubtful whether this rule has any bearing on the present case, as, although the collision occurred in the channel, the *Delaware* had not proceeded much more than her length into it, nor far enough to make any maneuver sufficient to avoid collision after passing the red fairway buoy. If, however, that rule has any application, the *Talisman* was plainly in fault under it for entering the channel at all when the *Delaware* was so close to the fairway buoy, unless she could bring her tow (which must be considered as a part of the *Talisman*) to the starboard or southerly side of the channel, so as to leave the other or northerly half of it free for the navigation of the *Delaware*.

The location of the collision by libelants' witnesses at mid-channel, with the tow on the hawser remaining far up into the northerly half of the channel, shows that the *Talisman* disobeyed Article 21, by not being with her tow on that side of the fairway or mid-channel, which lay on her starboard side.

In the *Leverington*, 11 *Prob. Div.*, 117, which the libelants cite as holding that the starboard hand rule is applicable in narrow channels, the preferred vessel, the *Rapid*, was on the wrong side of the channel, and, when about 300 yards away from the *Leverington*, attempted to make

her own or starboard side of the channel and was caught in collision before she reached it. The *Rapid* was solely to blame.

In the present case, the situation of the *Delaware* rounding the buoy was such that it was not "safe and practicable" for her to port and pass up the starboard side of the channel, for the reason that such an attempt involved danger of colliding with the pilot-boat.

III.

The *Talisman* was in fault for omitting to port her helm or to go astern in accordance with her whistle signals.

The collision occurred about three miles outside Sandy Hook within coast waters, where the revised International Regulations are in force.

Singlehurst v. *La Campagnie Générale Transatlantique*, 11 U. S. App., 693.

Article 19 of the International Regulations is as follows:

In taking any course authorized or required by these regulations, a steamship under way may indicate that course to any other ship which she has in sight by the following signals on her steam whistle:

One short blast to mean: "I am directing my course to starboard."

Two short blasts to mean: "I am directing my course to port."

Three short blasts to mean: "I am going full speed astern."

The use of these signals is optional, *but if they are used, the course of the ship must be in accordance with the signals made.*

During the five minutes last preceding the collision, the *Talisman* blew two single blasts upon her whistle at in-

tervals, and immediately before the collision, blew three short blasts, but "the course of the ship" was not "in accordance with the signals made."

When the *Talisman* was an eighth of a mile to the northward of the northerly line of the buoys of Gedney Channel, and after having shaped her course S. S. E. for the black can buoy, the *Delaware* being then headed about W.½S. for the mouth of the channel, and judged to be a mile and a quarter off, Captain Winnett blew a single blast upon his whistle.

Just as he was coming to the channel he blew a second single blast. The *Delaware* was then *one-fourth or one-eighth of a mile off.*

The course of the *Talisman* was not changed after either of those signals; she was kept right on.

When the steamer was a length or two off Winnett blew *three* short blasts on his whistle, but made no change of speed.

As the engines of the *Delaware* had been going full speed astern from 10.03 until 10.04 A. M., and as she stops from full speed (10 knots) to a standstill in 1 minute and 55 seconds, and, as both captains admit, the *Delaware* was at a full stop within a little more than her length from the place of the collision, it is evident that if the *Talisman* had ported her helm or reversed in accordance with her whistles the collision could not have occurred, as she would have crossed the *Delaware's* course ahead of the point at which the *Delaware* stopped, or stopped before she reached it.

The language of the rule is imperative:

"The use of these signals is optional, *but if they are used, the course of the ship must be in accordance with the signals made.*"

The failure of the *Talisman* to alter her course, in accordance with the signals, was a plain infraction of the rule, for which she should be held in fault.

In *Singlehurst* v. *La Compagnie Générale Transatlantique*, 11 U. S. App., 693, the vessels were crossing in the

lower bay, *La Champagne* being outward bound by way of the Main Ship Channel, upon a course E. by N. $\frac{1}{4}$ N., the *Lisbonense* being inward bound via South Channel, on a course NW. $\frac{3}{4}$ N. The *Lisbonense* (preferred vessel) blew a single blast upon her whistle, but did not change her course to starboard, her pilot apparently understanding that he was navigating under the supervising inspectors' rules, and that his one blast simply meant that he was to pass ahead of *La Champagne* (p. 703).

Collision having occurred, the *Lisbonense* was held in fault for failing to make the maneuver indicated by her whistle, the omission having resulted in her failure to reach the course of *La Champagne* as far ahead of that vessel as by her own signal, under Article 19, she had engaged to do.

LACOMBE, Circuit Judge (p. 704) said:

"Having given the one blast signal, however, the *Lisbonense* was bound by Article 19 to direct her course to starboard, and her failure substantially to make such change was a fault contributing to the collision, because by not so navigating she failed to reach the course of the other vessel as far ahead of her as by her own signals she engaged to do; although neither pilot at the time understood he was navigating under the International Regulations, or bound to make the change of course required upon giving the signals prescribed by Article 19; had she substantially so changed her course the collision would not have happened."

See the decision of Judge BROWN in the same case upon this point.

47 Fed. Rep., 122, 125.

The omission to port in accordance with the signal was an infraction of a statutory requirement, which places the burden upon the *Talisman*, to show that the omission could not possibly have contributed to the collision. She has not done so.

The *Pennsylvania*, 19 Wall., 125.
The *Bolivia*, 1 U. S. App., 26.
The *Duke of Buccleugh*, 1891 A. C., 310.

It may be that changing her course as signaled would have been a fault on the *Talisman's* part, but again, it might have averted collision; in any event, she cannot be heard to say she did not change because it would have been a fault, as an excuse for the other fault of not changing after she whistled that she would.

It is immaterial that this fault was not affirmatively averred in the answer. It appears on the face of the libel (p. 2). There is also the further averment in the libel that the collision occurred without the fault of the *Talisman*, which, being denied, is the equivalent of an affirmative averment of any fault appearing on the face of the libel.

Burrell v. *Crossman*, 69 Fed., 747, 752.

IV.

The *Delaware* is exonerated from all liability for this collision by the provisions of Section 3 of "An Act relating to navigation of vessels, &c.," approved February 13, 1893.

For a further and separate defense to the charges contained in the libel, the ninth article of the answer (fol. 37) alleged as follows:

Claimant further avers that the steamship *Delaware* is a tank steamship, engaged in the business of transporting merchandise or property to and from ports in the United States of America to ports in Europe, and that her owners exercised all due diligence to make the said vessel in all respects seaworthy, and properly manned, equipped and supplied, and that if the navigation of the said steamship, at the time and place mentioned, was in any respect negligent or faulty, which is denied, then by Section 3 of an Act of Congress of the United States, entitled An Act Relating to Navigation of Vessels, &c., approved February 13, 1893, neither the steamship *Delaware*, or her owner or owners, became or are liable to be held respon-

sible for the damages and losses alleged to have resulted therefrom or to have been sustained thereby.

The evidence showed that the *Delaware* was engaged in the business of transporting oil in bulk from United States ports to England, returning in ballast (*p.* 35); that she was in all respects seaworthy and fully outfitted and equipped (*pp.* 34, 35), carrying a duly licensed pilot (*p.* 114) and a crew of forty-two, all told, officers and men (*p.* 34), her first, second and third officers all holding the rank of master mariner (*p.* 35); and that the owners of the steamer had used all due diligence in the employment of the officers, to have the vessel properly manned, equipped and supplied (*pp.* 128–131).

No testimony or argument is suggested in dispute of these facts.

The legislation pleaded in defense of all liability is the statute commonly called the "Harter Act" (27 St., C. 105, p. 445; 2 Supp. R. S., C. 105, p. 81). This bill, as introduced in the House by Mr. Harter, and passed (H. R., 9176, 52d Congress, 2d Sess.), was plainly designed to relate only to the liabilities of common carriers of merchandise. In the Senate the title and body of the bill were both amended, as it appears from a perusal of the alterations there made, with the avowed purpose of extending the scope and application of the bill. The whole act, as originally introduced and as amended and passed, appears in the appendix.

The title of the bill and the third section (the first and second sections not being germane to this argument), in the form in which it passed the House, and as amended in the Senate and finally passed and approved, are set opposite each other, and read as follows:

H. R. 9176 (52d Congress, 2d Sess.).

"AN ACT RELATING TO *Contracts of Common Carriers* AND TO CERTAIN OBLIGATIONS, DUTIES AND RIGHTS IN CONNECTION WITH THE CARRIAGE OF PROPERTY.

"SEC. 3. That if any vessel transporting merchandise or property *between ports* in the United States of America *and foreign ports* shall *on starting on her voyage, be* in all respects seaworthy and properly manned, equipped, and supplied, neither the vessel, her owner or owners, agent, *or master* shall become or be held responsible for damage or loss resulting from *error of judgment* in navigation or in the management of said vessel *if navigated with ordinary skill and care, from the time of her leaving her usual place of loading on her intended voyage until her arrival at the usual place of discharge at her port of delivery,* nor shall the owner or owners, *the vessel,* or master be held liable for losses arising from dangers of the sea, acts of God, or public enemies, *or in saving life, and it may be stipulated in bills of lading and shipping receipts that the vessel may render services to property in distress afloat and tow same to the nearest and most convenient port of safety without incurring penalties from deviation in rendering such services.*"

[NOTE.—The words printed in italics were struck out by Senate amendments.]

As Amended, Passed and Approved, Feb. 13, 1893.

"AN ACT *relating to Navigation of Vessels, Bills of Lading* AND TO CERTAIN OBLIGATIONS, DUTIES AND RIGHTS IN CONNECTION WITH THE CARRIAGE OF PROPERTY.

"SEC. 3. That if *the owner of* any vessel transporting merchandise or property *to or from any port* in the United States of America shall *exercise due diligence to make the said vessel* in all respects seaworthy and properly manned, equipped and supplied, neither the vessel, her owner or owners, agent, *or charterers* shall become or be held responsible for damage or loss resulting from *faults or errors* in navigation or in the management of said vessel, nor shall the *vessel, her* owner or owners, *charterers, agent,* or master be held liable for losses arising from dangers of the sea *or other navigable waters,* acts of God, or public enemies, *or the inherent defect, quality, or vice of the thing carried, or from insufficiency of package, or seizure under legal process, or for loss resulting from any act or omission of the shipper or owner of the goods, his agent or representative, or from saving or attempting to save life or property at sea, or from any deviation in rendering such service.*"

[NOTE.—The words in italics were inserted by Senate amendments.]

The principal changes by Senate amendments are:

(**1**.) Change in the title, causing it to read, "An Act relating to the *navigation of vessels*, &c., thereby indicating that the first and primary object was the introduction of different liabilities in regard to navigation.

(**2**.) Extending the third section to vessels trading "*to or from* any port in the United States," thus enlarging the scope of the navigation section beyond that of the first and second sections, which relate only to vessels trading between United States ports and between [from] ports in the United States and [to] foreign ports.

(**3**.) Limiting the obligation of seaworthiness to the exercise of due diligence to make the vessel seaworthy and properly manned, equipped and supplied, impliedly doing away with the former absolute warranty of seaworthiness.

(**4**.) Striking out the words "*error of judgment* in navigation, or in the management of said vessel, *if navigated with ordinary skill and care* from the time of her leaving her usual place of loading, on her intended voyage, *until her arrival at the usual place of discharge at the port of delivery*," and substituting in place of them, the words "*faults or errors in navigation*, or in the management of said vessel," without qualification.

(**5**.) Striking the *master* out of the class of persons exempted from responsibility.

(**6**.) Omitting the requirement that the duty of diligence by the owner shall be performed *with reference to a particular voyage*, and simply making that duty a general one.

Whatever may have been the purpose of those who originally promoted the legislation, it is impossible to escape the conclusion that the design of the Senate amend-

ments (and of the Congress in accepting them) was to extend the principle of the limitation of liability acts, and to modify, if not to abrogate the doctrine of *respondeat superior* for wrongful acts and omissions at sea.

The owner is required to exercise due diligence in the employment of his men, and in the outfitting and equipment of the vessel. Having done this, the statute, in plain words, says he is not to be responsible for "faults or errors in navigation or in the management of said vessel."

The reason for this exemption appears to be that the owner can do nothing to prevent faults or errors in navigation beyond an honest endeavor to secure competent servants, and therefore is in no *personal* fault for the consequences of their negligence; and, as if to emphasize this reason with distinctness, the Senate amendments provided that the *master* should not be exempt from liability.

After the ship sails upon her voyage, the ship-owner's servants are servants only in a figurative sense; for the person exercising entire control of the management and navigation of the ship at the time the fault is committed, has actually ceased to be a servant, and has become the real and, in a sense, the independent master of the ship.

This difficulty of holding the master liable for his servants' faults in such cases under the doctrine of *respondeat superior* has been remarked by legal writers and by the courts, but has not been satisfactorily explained away. Professor POLLOCK, in discussing the fiction of imputed fault in such cases, says:

"No reason for the rule, at any rate, no satisfying one, is commonly given in our books. Its importance belongs altogether to the modern law, and it does not seem to be illustrated by any early authority. Blackstone (I., 417,) is short in his statement, and has no other reason to give than the fiction of an 'implied command.' It is currently said *respondeat superior;* which is a dogmatic statement, not an explanation. It is also said *qui facit per alium, facit per se*, but this is in terms only applicable to authorized acts, not to acts that, although done by the agent or servant 'in the course of the service,' are

specifically unauthorized, or even forbidden."—(*Law Quarterly Review, 1885, p. 209.*)

The design of Congress thus appears to have been to do away with the principle of imputed fault in such cases; to hold the shipowner rigidly accountable for the exercise of diligence in making the vessel seaworthy, and having her properly manned, outfitted and equipped, and then to absolve him from all faults in management or navigation, and for other accidents peculiar to the sea, for which he is not morally responsible, and to leave the persons injured through the occurrence of any of the excepted matters to their recourse upon insurance.

In this way, the burdens upon ships, in commerce, would be lightened without injustice to any injured interests, whether cargo on board the wrongdoing ship, or another ship, or cargo on board such other ship.

Its effect is simply to require the injured party to apply to his own underwriters for recoupment, instead of to the wrongdoing vessel or her underwriters; in the great majority of maritime casualties, its sole effect would be to cut off the underwriter's right of subrogation.

The intent to enlarge the scope of the act in its passage is clearly shown.

The alteration of the title in the Senate, and the substitution of the words "faults or errors in navigation," in place of the words "error of judgment in navigation, if navigated with ordinary skill and care, from the time of her leaving her usual place of loading, on her intended voyage, until her arrival at the usual place of discharge at the port of delivery," shows an intention to enlarge the scope of the Act by introducing into it a definition of the liability in certain cases for damage caused by collision.

It is competent to refer to the title in the determination of this question.

The *Rector, &c.*, v. *U. S.*, 143 *U. S.*, 457.
U. S. v. *Fisher*, 2 *Cranch.*, 358, 386.

U. S. v. *Palmer*, 3 *Wheat.*, 613, 631.
Coosaw v. *South Carolina*, 144 *U. S.*, 550.
U. S v. *Bashaw*, 4 *U. S. App.*, 360, 367.

In *U. S.* v. *Fisher* (*supra*), Mr. Chief Justice MARSHALL said:

"Neither party contends that the title of the act can control plain words in the body of the statute, and neither denies that taken with other parts, it may assist in removing ambiguities. Where the intent is plain, nothing is left to construction. Where the mind labors to discover the design of the Legislature, it seizes everything from which aid can be derived, and in such case, the title claims a degree of notice, and will have its due share of consideration."

In *U. S.* v. *Bashaw* (*supra*), SHIRAS, *D. J.* (at p. 367), said:

"The natural presumption is that the phraseology of the statute was changed in order to change its meaning."

The introduction of the word "faults" is also important.

Probably no word in the terminology of collision cases, has a more distinctive and well-defined meaning than the word "fault." A "fault" is primarily the neglect of some proper precaution to avoid a collision.

The *Nautilus*, 1 *Ware*, 529.

It is only used synonymously with "negligence" in collision cases. In negligence cases at law, or in tort cases in admiralty, other than collisions, one would not expect to find a statement that the want of care in certain particulars constituted a fault, for which the defendant should be held liable; such expression would only be found in cases of collision. The expression in other cases would be that the specific want of care found constituted "negligence," for which the ship or the defendant was chargeable.

It is furthermore observable that the third section of this statute in no way refers to any bill of lading or contract.

The first, second, fourth and fifth sections of the act deal with what may lawfully be inserted in a bill of lading; with the duty to issue a bill of lading, containing certain enumerated particulars; and with the penalty, which is plainly applicable only to the first, second and fourth sections. These sections thus deal primarily with certain rights, duties and obligations of carriers, as stated in the second half of the title.

The third section is a *codification* of the maritime law to a limited extent, and its operation is wholly irrespective of contract. The difference in the scope and aim of this section from the others is thus apparent. This is the only section which deals with *navigation* apart from contract, and is thus the only one to which the change in title, making the act primarily an "act relating to navigation of vessels," can refer. The inference is thus clear that the intention of changing the title and third section was to have it regulate and modify the shipowner's existing duties and obligations in matters of navigation not touched by contract. The most important of these obligations was, of course, collisions with other ships.

The section exacts the exercise of due diligence from the owner to make the vessel seaworthy, and have her properly outfitted and equipped, and then provides that he shall not be liable for certain specified matters which occur without his personal fault and for which he is not morally responsible. These are, amongst other things: Faults or errors in the management or navigation of the ship, which plainly may result in loss or damage to his own ship or to goods on board of it; or to another ship or goods on board of *it*, and certain losses which may come to the cargo on board his own ship, not arising from faults or errors in the management or navigation of the vessel, but from causes for which he is not to blame.

The apparent purpose of the act being to release shipowners and vessels from all liability for faults in navigation, the question arises, has the intent been effective?

In the present case the objections urged against the validity of this defense are:

(**1**.) That the act does not purport to affect the liability of the ship for the neglect of a pilot taken by compulsion of law.

(**2**.) That the *Delaware* at the time of collision was not "transporting merchandise or property."

(**3**.) That the act was not designed to release vessels from liability to other vessels for collision damage, but must be limited by construction to claims against vessels by their own cargo.

These may be briefly considered in order:

1. It is true the word pilot is nowhere mentioned in the third section. The statute has not attempted to enumerate the persons for whose faults the shipowner is exempted. The phrase is: "Neither the vessel, her owner or owners, agent or charterers, shall become or be held responsible *for damage or loss resulting from faults or errors in navigation*." The plain purpose of this seems to be to release the ship from the faults of all persons who may be engaged in or control the navigation at the time the fault is committed.

The *Etona*, 64 Fed., 880.

The words are directed towards relieving the ship and owners from the *result*, not specifically from the faults of certain enumerated persons.

Damages from the fault of a pilot would be naturally included.

Mr. Justice GRAY, in speaking of the pilot's functions in *Ralli* v. *Troop*, 157 *U. S.*, 386, 402, said:

"The reason for requiring a vessel to take a pilot is his familiar acquaintance with particular waters. 'His duty,' said Mr. Justice STORY, speaking for this Court, 'is properly the duty to navigate the ship over and through his

pilotage limits, or, as it is commonly called, his pilotage ground (Hobart *v.* Drogan, 10 Pet., 108, 123).' *To the pilot, therefore, temporarily belongs the whole conduct of the navigation of the ship, including the duty of determining her course and speed*, and the time, place and manner of anchoring her."

In such circumstances to hold the ship freed from the faults of her own servants, but not from the faults of a compulsory pilot, would defeat in part the object for which the statute was enacted.

In The *China*, 7 Wall, 53, the vessel was held liable for the neglect of a pilot in navigation under the maxim *sic utere tuo ut alienum non lædas;* but no authorities were cited in the opinion to show that any such principle as applied to the case in hand obtained in the civil law.

It is a striking fact that proceedings *in rem*., in the sense that they are understood under our law, do not exist at present in any of the countries of Europe, whose jurisprudence is derived from the civil law, nor is there any record in the Black Book of the Admiralty of any such proceedings or process in the Middle Ages. The process in continental Europe is, and, so far as mediæval writers on the civil law show, always has been, *in personam*, coupled with an attachment of the property which is thus impounded as security (5 *Desjardin*, No. 1112).

The oldest authority upon the admiralty practice in England is *Clerke's Praxis*, a book written by Francis Clerke, Proctor in the Court of Arches during the reign of Elizabeth (*Hall Adm., p. III.*), of which an entire translation is embodied with an essay on admiralty jurisdiction, in *Hall's Admiralty Practice*, published in Baltimore in 1809. Clerke gives the forms of the warrants and citations which were used in his day.

The original warrant was a warrant *in personam*, directing the Marshal "to arrest and hold the defendant and to detain him in sufficient custody until he has legally appeared" (Hall, p. 3).

Title 28 of Clerke's Practice provides that if the defendant has "concealed himself, or has absconded from the

kingdom, so that he cannot be arrested if he have any goods, merchandise, ship or vessel upon the sea, or within the ebb and flow of the sea, and within the jurisdiction of the Lord High Admiral, a warrant is to be impetrated to this effect, namely, to attach such goods or such ship of D, the defendant, in whose hands soever they may be, and to cite the said D, specially, as owner, and all others who claim any right or title to them, to be and appear on a certain day to answer unto P, in a civil and maritime cause" (Hall, p. 60).

The only instance mentioned in *Clerke* of a proceeding *in rem*, as distinguished from a proceeding *in personam*, coupled with an attachment, is in Title 41, entitled "The manner of arresting your own goods when they are detained, occupied or possessed by another."

The nature of that warrant is described as follows:

"It often happens, and especially in time of war or commotion, that your goods or vessel are taken by enemies or pirates and afterwards brought to this kingdom, or are possessed or detained by others in some other manner, or the factor or agent of your correspondents in parts beyond seas may consign certain goods to your use or benefit, and they are detained unjustly possessed by some person. In such cases, you may obtain a warrant to arrest the goods after this manner as your proper goods, and also a citation as well against those in particular thus occupying or detaining as against all others in general, who have or pretend to have any interest in them, to answer you in a certain cause of a civil or maritime nature" (*Hall*, p. 81).

The long controversy between the common law and the admiralty Judges in England, in regard to the admiralty jurisdiction, was at least in part due to the admiralty Judges, administering a different system of jurisprudence by the same form of proceedings (*in personam*) as in actions at law.

In the resolution of the King's Council, subscribed February 4, 1632, by all the Judges of both benches (*Hall's Adm.*, XXIV.), it was agreed that no prohibition should issue in *in personam* suits upon contracts made or other

things personal done beyond seas, nor in actions upon charter-parties, provided no penalty was demanded and no question existed as to whether the charter-party had been made or not, or whether the plaintiff released or otherwise discharged the same within the realm. And in suits for building, amending, saving or necessary victualing of a ship, no prohibition was to issue, provided the suit was

"*against the ship itself, and not against any party by name*, or such as for his interest makes himself a party."

It is notable that in this agreement no mention is made of jurisdiction for damage done by collisions, whether *in personam* or *in rem*.

This agreement was afterwards disavowed and said to have been renounced by several of the Judges (*Hall's Adm.*, XXVI.); but the jurisdiction of the Admiralty Court was again settled, April 12, 1648, as appears from Scobell's Collection of the Acts and Ordinances of the Republican Government of England, Anno. 1648, p. 147, by an Act of Parliament, as follows:

"The Lords and Commons assembled in Parliament, finding many inconveniences daily to arise in relation both to the trade of this Kingdom and the commerce with foreign parts through the uncertainty of jurisdiction in the trial of maritime causes, do ordain, and be it ordained by the authority of Parliament:

That the Court of Admiralty shall have cognizance and jurisdiction against the ship or vessel, with the tackle, apparel and furniture thereof, in all causes which concern the repairing, victualing and furnishing provisions for the setting of such ships or vessels to sea; and in all cases of bottomry, and likewise in contracts made beyond the seas, concerning shipping or navigation or damages happening thereon, or arising at sea in any voyage; and likewise in all cases of charter parties or contracts for freight, bills of lading, mariners' wages or damages in goods laden on board ship, *or other damages done by one ship or vessel to another;* or by anchors or want of laying of buoys, except always that the said Court of Admiralty shall not hold pleas, or admit actions upon any bills of exchange or accounts betwixt merchant and merchant or their factors."

This appears to be the first sanction in English law or practice of a suit for collision damages *in rem.* not coupled with proceedings *in personam*, or any citation to a defendant by name.

The earliest reported collision case, in which preceedings were *in rem.* is that of *Harbyn* vs. *Berry* (The *Thomas and John*) reported in *Marsden's Admiralty Decisions*, p. 235 (1648).

The case appears to have come on to be heard on the 8th of September, 1648, "*coram venerabilibus viris doctoribus Clerke et Exton Judicibus in Cenaculo Dominorum Advocatorum.*" The Clerke thus mentioned is presumably Francis Clerke, the author of Clerke's Praxis.

The suit was brought by Thomas Berry and others, owners of the ship *Thomas*, and Nicholas Skinner and others, owners of goods on board, "*contra navem quondam vocatam* The *John*," and against the goods on board the *John*, and against "Holditch *et alios pro interesse suo in bonis in navi the John prædicta attachiatis*"—a libel *in rem.* and *in personam;* although the novelty of this form of proceeding was apparently such that the entry of the title in the The Act Book reads "*Berry, Skinner, et alli, contra Holditch et alios.*"

This was apparently the beginning of proceedings *in rem.*, as now understood in causes of collision. From that time to the present, under English law, the cases so far as reported show no lien on a vessel for collision caused by the fault of a pilot (see The *China*, 7 Wall., 53) and as under the modern codes derived from the civil law, there is no lien (privilege) for collision damages, whether caused by the negligence of a pilot or otherwise (The *Young America*, 30 Fed., 789–799), it is doubtful whether any such lien or liability existed until the decision in The *China*.

At law, a shipowner is not liable for collision damages caused by the negligence of a pilot, for the reason that

the pilot is forced upon him compulsorily, and is not his agent nor his servant.

Bussy v. *Donaldson*, 4 Dall., 206.
Homer Ramsdell Trans. Co. vs. *Compagnie Générale*, 63 Fed. Rep., 845.
Williamson v. *Price*, 4 Mart. (U. S.), 399.
Allen vs. *Steamship Co.* 132 N. Y., 91.

Every reason, therefore, which would favor relieving the owner from responsibility for faults or errors in navigation by his servants, would apply *a fortiori* to a pilot's faults or errors, and as all pilots are licensed by law, and their qualifications are presumably sufficient, the owner exercises due diligence, within the third section of the act, by employing a licensed pilot when his vessel reaches anchorage grounds.

2. The *Delaware* was "transporting property." If the purpose of the third section was to lighten the burdens of commerce by favoring vessels engaged in the business of transporting merchandise or property to or from ports in the United States, as distinguished from tugboats, yachts and harbor vessels, not engaged in foreign commerce, it must be taken that the exemption is general as applied to the specified class of ships, and extends to them at all times, whether at the moment they happen to have cargo aboard or not. All vessels are at all times, in a broad sense, "transporting property," and the *Delaware* was at this time transporting property on a voyage from a foreign port to New York.

The limitation of the statute to vessels transporting merchandise or property defines the *class* to which the exemptions apply, to those engaged in the *business* of transporting merchandise or property in foreign commerce. If the act applies at all to collisions between vessels, it surely can make no difference in the right to exemption whether the vessel is coming in to port for a cargo or going out

with one, so long as she falls in the exempt class of vessels engaged in the business of foreign commerce.

The *Mamie*, 5 Fed., 813.

3. The third section is not limited to cases of damage to cargo on board the offending vessel.

The act is remedial. It was of course designed to apply to cargo cases, and to abolish *protanto* the existing law as to negligence clauses in bills of lading; but it does not follow that such was its sole purpose. It is designed to foster foreign commerce and to limit legal accountability to all cases where the shipowner is not really (morally) accountable, owing to his personal fault. In this view the statute should be liberally construed, so as to give full and fair effect to all the provisions in every case of damage or loss resulting from faults in navigation, upon whomsoever it falls.

It could be a matter of no consequence to Congress whether a particular fault in navigation injured an owner of cargo on the carrying ship, or on another ship, or injured that other ship itself. What Congress meant to do was to release the ship and owners from the consequences of faults which their diligence had not sufficed to avoid wherever the damage might fall.

The true inquiry in every case therefore should be, not who sustained the damage, but did the shipowner's want of dilgence contribute to it; if it did not, he should be absolved.

This intent is shown most clearly by the amendments of the title and the body of the third section. Originally it related to "contracts of common carriers" [expressed and implied]; "to certain obligations, duties and rights in connection with the carriage of property."

Plainly that title gave no notice of intent to change rights or obligations in regard to navigation in general.

Section three further provided that the vessel was to be seaworthy "on starting on her voyage," *i. e.*, with the cargo, and in all cases was bound to be "navigated with

ordinary skill and care *from the time of leaving her usual place of loading* on her intended voyage *until her arrival at the usual place of discharge at her port of delivery.*"

As passed, both of these clauses were omitted, and the title amended to make the statue primarily "An act *relating to navigation of vessels.*"

"Faults," in navigation a distinctively collision term, is included in the category of exempt matters.

Although several cases in the District Courts have held that the statute did not apply to damage done by one ship to another, or to the other's cargo, the only opinion attempting to state reasons for the holding, is that of Judge BROWN, in The *Viola*, 59 Fed. Rep., 632, 634.

The opinion in that case opens with a consideration of the results that would follow from adopting the construction which would make the statute applicable to collisions. But surely Courts have nothing to do with results, or with the policy of the law, if its language is plain and unambiguous.

The opinion then proceeds to hold, that as all the other provisions of the statute, except that which relates to navigation of vessels, are limited to cases arising in the contractual relation of shipper and carrier, the third section should also be so limited; but this is based in part upon an error of statement, where it is said:

"The third section, *treating in part of the same subject of bills of lading*, purports to relieve the vessel and owner of part of their liability, under the existing law, for faults of navigation."

There is no reference whatever, in the third section, to bills of lading, or to any contractual relation, and in so far as the opinion proceeds upon that assumption, it is clearly erroneous.

The argument that the words "faults or errors in navigation" are to be limited to damage to the ship's own cargo from such faults or errors, because the other matters enumerated in the statute for which the ship is not liable

are matters which could only affect her cargo, does not appear to be sound, for the reason that the exceptions are stated disjunctively and separately, and in the natural import of the words would deal with two separate matters, both of which are suggested in the title.

A similar question arose under the original English Pilotage Act, 52 George III., Chapter 39, Section 3, which provided as follows:

"That no owner or master of any ship or vessel shall be answerable for any loss or damage, nor shall any owner or owners of any ship or vessel, or consignee of goods, be prevented from recovering any loss or damage upon any contract of insurance of the same, or upon any other contracts relating to any ship or vessel, or any cargo on board the same, or by reason or means of any neglect, default, incompetency or incapacity of any pilot taken on board of any such ship or vessel, under or in pursuance of the provisions of this act."

Apparently the first case arising under this statute was that of *Carruthers* v. *Sydebotham*, 4 *Maule & Selwyn*, 77 (55 George, 3), which came before the King's Bench in 1815, and was an action on a policy.

Lord ELLENBOROUGH, *C. J.* (p. 85) said:

"The regulations of the General Pilot Act impose a penalty upon the master of every ship which shall be piloted by any other person than a pilot duly licensed, within any limits for which pilots are lawfully appointed. And there is an exception of such places for which pilots are not appointed: but if the master cannot navigate without a pilot, except under a penalty, is he not under the compulsion of law to take a pilot? And if so, is it just that he should be answerable for the misconduct of a person whose appointment the provisions of the law have taken out of his hands, placing the ship in the hands and under the conduct of the pilot? The consequence is that there is no privity between them."

In 1817 the case of *Bennett* v. *Moita*, 7 *Taunton*, 258, arose, which was an action against the master of a Portuguese vessel for running down the plaintiff's ship as defendant was coming up the river.

The defendant had a pilot on board, as required by law, but there was no evidence whether the accident was occasioned by any personal negligence or misconduct of the pilot or of any other persons. The defendant objected that the plaintiff could not recover, contending that the defendant was exempted from being liable to the plaintiff under the circumstances by the Pilotage Act (52 George III., C. 39, Sec. 30).

GIBBS, *C. J.*, held that the master was not answerable unless it was expressly proved that the damage was occasioned by the neglect or default of the master or his servants, and directed a nonsuit.

On motion for a new trial, it was held by the full Bench that the direction was right.

DALLAS, *J.* (p. 259), said:

"It must be presumed that the damage was occasioned through the negligence of him who has the management of the ship; and that within the Thames is by law committed to the pilot, of which fact the statute is notice to all the subjects; and it must be taken that whatever happens to the ship in the course of that navigation, must be imputed to the pilot, unless he show that his orders were disobeyed."

In the subsequent case of *Ritchie* v. *Bowsfield*, 7 *Taunton*, 307, brought for collision damages, the point was first taken that is now urged here, that the language of the section showed that it was intended to be limited in its application to cases of damage to goods on board a piloted ship, and did not extend to damage done by that ship to others.

At Nisi Prius the objection was overruled, and this ruling was sustained by the full Bench.

DALLAS, *J.*, said:

"The 30th section of the statute seems to me emphatically to apply to this case more than to any other; for the steering of the ship is the act of the pilot, and it is in the steerage of the ship that the other is run down. There is nothing in the objection."

PARK, *J.*, said:

"Is not the running down of one ship by another a loss or damage? I can hardly conceive a case in which the act of 'the pilot's steering a ship can injure the goods on board the same ship.'"

The substantial parts of the Pilotage Act of 52, George III. and our own, put side by side, are strikingly similar in phraseology and import:

ENGLISH PILOTAGE ACT.	HARTER ACT.
That no owner or master of any ship or vessel shall be answerable for any loss or damage (arising from the pilot's fault).	Neither the vessel, her owner or owners, agent or charterer shall become or be held responsible for damage or loss resulting from faults or errors in navigation or in the management of said vessel.
Nor shall any owner or owners of any ship or vessel or consignee of goods be prevented from recovering any loss or damage upon any contract of insurance of the same.	*Nor* shall the vessel, her owner, &c., be held liable for losses arising from dangers of the sea, &c., or the inherent defect, quality or vice of the thing carried or from insufficiency of packages, &c.
Or upon any other contracts relating to any ship or vessel, or any cargo on board the same (by reason of a pilot's fault).	

The first clause of the English Act, which is of precisely similar import to the first clause of the Third Section of the Harter Act (as above shown), has been held to apply to a collision between one ship and another. The second and third clauses, which are stated disjunctively, have been held to apply to insurance and to damage to cargo, and the argument that because cargo matters were chiefly dealt with, that therefore collisions were not to be deemed to be dealt with by the statute at all, has been rejected. The latter clause of the third section of the Harter Act, which is also stated disjunctively, applies with equal plainness to cargo matters, and no reason exists, it is submitted, for holding that the

whole section should be limited to cargo matters, which did not exist, and which was not rejected in the above cases which construed the statute of George III.

No violence to language is done and no canon of construction violated by interpreting the statute to mean that if the owner has used diligence in the particulars required he is absolved from liability for losses due to faulty navigation by his servants, no matter upon whom or what the losses may happen to fall.

V.

The decree appealed from should be reversed and the libel against the *Delaware* dismissed, or, in the alternative, the damages should be divided.

December 31, 1895.

Respectfully submitted,

CONVERS & KIRLIN,
Proctors for Appellant.

J. PARKER KIRLIN,
Of Counsel.

APPENDIX.

HARTER ACT.

(NOTE.—Italics indicate parts changed by amendments in the passage of the bill.)

H. R. 9176. [PUBLIC—No. 57.]

A BILL relating to contracts of common carriers and to certain obligations, duties and rights in connection with the carriage of property.

AN ACT relating to navigation of vessels, bills of lading, and to certain obligations, duties, and rights in connection with the carriage of property.

Be it enacted, etc., That it shall not be lawful for *any common carrier* or the manager, agent, master or owner of any vsssel transporting merchandise or property from or between parts of the United States and foreign ports to insert in any bill of lading or shipping document any clause, covenant or agreement whereby it, he, or they shall be relieved from liability for loss or damage arising from negligence, fault, or failure in proper loading, stowage, custody, care in transport, or proper delivery of any and all lawful merchandise or property committed to its or their charge, *nor shall it be lawful to limit its or their liability to less than a full indemnity to the legal claimant for any loss or damage therefrom, and* any and all words or clauses of such import inserted in bills of lading or shipping receipts shall be null and void and of no effect.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That it shall not be lawful for the manager, agent, master, or owner of any vessel transporting merchandise or property from or between ports of the United States and foreign ports to insert in any bill of lading or shipping document any clause, covenant, or agreement whereby it, he, or they shall be relieved from liability for loss or damage arising from negligence, fault, or failure in proper loading, stowage, custody, care, or proper delivery of any and all lawful merchandise or property committed to its or their charge. Any and all words or clauses of such import inserted in bills of lading or shipping receipts shall be null and void and of no effect.

SEC. 2. That it shall not be lawful for any vessel transporting merchandise or property from or between ports of the United States of America and foreign ports, her owner, master, agent, or manager, to insert in any bill of lading or shipping document any covenant or agreement whereby the obligations of the owner or owners of said vessel *to* properly equip, man, provision, and outfit said vessel, and make said vessel seaworthy and capable of performing her intended voyage, or *any covenant or agreement* whereby the obligations of the master, officers, agents, or servants to carefully handle and stow her cargo and to care for and properly deliver same, shall in any wise be lessened, weakened or avoided.

SEC. 2. That it shall not be lawful for any vessel transporting merchandise or property from or between ports of the United States of America and foreign ports, her owner, master, agent, or manager, to insert in any bill of lading or shipping document any covenant or agreement whereby the obligations of the owner or owners of said vessel *to exercise due diligence*, properly equip, man, provision, and outfit said vessel, and *to* make said vessel seaworthy and capable of performing her intended voyage, or whereby the obligations of the master, officers, agents, or servants to carefully handle and stow her cargo and to care for and properly deliver same, shall in any wise be lessened, weakened, or avoided.

SEC. 3. That if any vessel transporting merchandise or property *between* ports in the United States of America

SEC. 3. That if *the owner* of any vessel transporting merchandise or property *to or from any port* in the United States

and foreign ports shall, *on starting on her voyage, be* in all respects seaworthy and properly manned, equipped, and supplied, neither the vessel, her owner or owners, agent *or master* shall become or be held responsible for damage or loss resulting from *error of judgment* in navigation or in the management of said vessel, *if navigated with ordinary skill and care, from the time of her leaving her usual place of loading on her intended voyage until her arrival at the usual place of discharge at her port of delivery*, nor shall the owner or owners, *the vessel*, or master be held liable for losses ari-ing from dangers of the sea, acts of God, or public enemies, *or in saving life, and it may be stipulated in bills of lading and shipping receipts that the vessel may render services to property in distress afloat and tow same to the nearest and most convenient port of safety without incurring penalties from deviation in rendering such service.*

SEC. 4. *That it shall be the duty of the owner or owners, agent, manager, or other authorized person to issue to shippers of any lawful merchandise a bill of lading or shipping document stating the marks, packages, or quantity and apparent condition of such merchandise or property delivered to and received by the owner, master, or agent of the vessel for transportation, and the voyage, or ports at which such vessel is intended to touch, and such document shall be evidence of the responsibility of the vessel for the merchandise therein described.*

SEC. 5. *That it shall be the duty of the collector of the port in which the vessel is lying to refuse clearance to a vessel from said port if he is informed and is satisfied that the owner, master, agent, commercial carrier, or other person representing such vessel, has issued bills of lading for merchandise or property containing clauses that are declared not lawful by section 1 or section 2 of this act, or if he is informed and is satisfied that the owner, agent, master, or other person representing such vessel, will not issue bills of lading, as required by section 4 of this act, for merchandise or property delivered to and received by the vessel for transportation; and the said collector shall withhold clearance papers to said vessel until bills of lading or shipping documents are issued to conform to the said first, second, and fourth sections of this act, or if documents*

of America shall *exercise due diligence to make the said vessel* in all respects seaworthy and properly manned, equipped, and supplied, neither the vessel, her owner or owners, agent, *or charterers* shall become or be held responsible for damage or loss resulting from *faults or errors* in navigation or in the management of said vessel nor shall the *vessel*, her owner or owners, charterers, *agent*, or master be held liable for losses arising from dangers of the sea *or other navigable waters*, acts of God, or public enemies, *or the inherent defect, quality, or vice of the thing carried, or from insufficiency of package, or seizure under legal process, or for loss resulting from any act or omission of the shipper or owner of the goods, his agent or representative, or from saving or attempting to save life or property at sea, or from any deviation in rendering such service.*

SEC. 4. *That it shall be the duty of the owner or owners, masters or agent of any vessel transporting merchandise or property from or between ports of the United States and foreign ports to issue to shippers of any lawful merchandise a bill of lading, or shipping document, stating, among other things, the marks necessary for identification, number of packages, or quantity, stating whether it be carrier's or shipper's weight, and apparent order or condition of such merchandise or property delivered to and received by the owner, master, or agent of the vessel for transportation, and such document shall be prima facie evidence of the receipt of the merchandise therein described.*

SEC. 5. *That for a violation of any of the provisions of this act the agent, owner, or master of the vessel guilty of such violation, and who refuses to issue on demand the bill of lading herein provided for, shall be liable to a fine not exceeding two thousand dollars. The amount of the fine and costs for such violation shall be a lien upon the vessel, whose agent, owner, or master is guilty of such violation, and such vessel may be libeled therefor in any district court of the United States, within whose jurisdiction the vessel may be found. One-half of such penalty shall go to the party injured by such violation and the remainder to the Government of the United States.*

have been previously issued, until they are modified to conform to the requirements of said sections.

SEC. 6. That this act shall not be held to modify or repeal Sections 4281, 4282, and 4283 of the Revised Statutes of the United States.

SEC. 7. That this act shall take effect from and after the 1st day of *September, 1892.*

(Passed the House, amended to read as above, December 16, 1892. 24 Cong. Rec., pp. 147–149, 169.)

SEC. 6. That this act shall not be held to modify or repeal sections forty-two hundred and eighty one, forty-two hundred and eighty-two, and forty-two hundred and eighty-three of the Revised Statutes of the United States, *or any other statute defining the liability of vessels, their owners, or representatives.*

SEC. 7. *Sections one and four of this act shall not apply to the transportation of live animals.*

SEC. 8. That this act shall take effect from and after the first day of *July,* eighteen hundred and *ninety three.*

Passed the Senate as amended February, 1893. 24 Cong. Rec., 1275. Senate amendments concurred in February 8th, 1893. 24 Cong. Rec., 1342.

Approved, February 13, 1893.

JAMES H. [illegible]
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1895.

No. 570

The Steamship DELAWARE, THOMAS THOMAS
Claimant-Appellant

against

CHARLES H. WINNETT AND OTHERS
Libellants-Appellees

BRIEF FOR THE APPELLEES

HARRINGTON PUTNAM
Advocate

LIVINGSTON MIDDLEDITCH CO., 149-153 LEONARD ST., N. Y.

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SUPREME COURT OF THE UNITED STATES.

THE STEAMSHIP "DELAWARE," her engines, &c., THOMAS THOMAS, Claimant-Appellant, vs. CHARLES H. WINNETT *et al.*, Appellees.	No. 570.

BRIEF FOR THE APPELLEES.

This is an Admiralty appeal brought here by *certiorari* to the United States Circuit Court of Appeals for the Second Circuit. The Court below having first certified to this Court the questions of law raised by the answer of the claimant (Cause No. 555) this Court granted the further writ to bring up the entire record.

The following summary of the facts was made by the Judges of the United States Circuit Court of Appeals (Record, p. 136):

"The libel to recover damages by collision was filed by the owner, master and crew of the steamtug *Talisman*, which was sunk on September 16, 1893, by the steamship *Delaware*, in Gedney Channel, at the outer entrance of New York Harbor, and within three miles from land.

"The steamship *Delaware* was engaged in the business of transporting petroleum in bulk from American ports to Europe. She was returning from London to New York without cargo, having water ballast only, as was customary on her westward voyages. When approaching New York she took a duly licensed Sandy Hook pilot, who was in charge of her navigation at the time of the collision. By the negligence of this pilot, who failed to take any precautions to avoid the *Talisman*, the steamship struck and sank the tugboat *Talisman*. One of the crew was drowned, and severe personal injuries were sustained by the master.

"The decree of the District Court awarded damages for the loss of the tugboat and the personal injuries of the master.

"The collision having been caused by the negligent navigation of the *Delaware*, it was nevertheless claimed that neither the said steamship nor her owners were liable therefor by reason of Section 3 of an Act of Congress of the United States entitled, 'An act relating to navigation of vessels, bills of lading, and to certain obligations, duties and rights in connection with the carriage of property,' approved February 13, 1893 (being 27 Statutes at Large, 2d session, chap. 105).

"In support of said defense, it was shown that the Anglo-American Oil Company, a corporation of Great Britain, was the owner of the steamship *Delaware*, and that due diligence had been exercised by the said company to make said steamship in all respects seaworthy and properly manned, equipped and supplied, within the provisions of Section 3 of said act."

The case was first heard in the District Court and is reported at 61 F. R., 525. There have been no further proofs since and no amendment of pleadings. The District Judge, the Honorable Charles L. Benedict, and the three Judges of the Circuit Court of Appeals were unanimous in holding the *Delaware* solely at fault. The latter Court, after a patient hearing of appellant's counsel, even declined to hear counsel for the appellees in support of the merits of the decree below. An order of affirmance, with interest and costs, was entered subject to the decision here upon the questions of law certified to this Court (p. 138). Upon the removal of the record to this Court, two questions are therefore presented :

First.—The *Delaware* being clearly at fault, is the tug *Talisman* also chargeable with fault—a question mainly of fact.

Second.—Is the *Delaware* or its owner exonerated from collision liability by the terms of the Statute of February 13, 1893—which requires this Court to interpret and determine the scope of an important Act of Congress.

If the appellant's contention is to be sustained, and the effect of this statute is henceforth to free ship-owners from all liability for collision, and to leave the Rules of the Road at Sea without judicial enforcement, obviously this Court would never be called on to consider the first question. A statutory exemption from collision liability instantly ends this suit. As, however, the appellant has first argued upon

the merits of the collision, these propositions will be considered in the same order.

Preliminary to the merits of the navigation it will be convenient to describe the locality of the collision.

Nearly every large steamer coming from Europe to New York crosses the outer bar through a dredged passage, long known as Gedney Channel. Its direction is W. N. W. $\frac{1}{4}$ W. It is defined by red buoys along the northern or eastern side at intervals of 2,000 feet and corresponding black buoys on the southwestern side at the same distance apart. Colored electric lights (red and white) on these buoys similarly show the channel lines at night. The odd numbers are the black buoys and the red buoys are even. Thus the two first spar buoys are No. 1 (black) on the south side and No. 2 (red) on the north. Two iron can buoys, sometimes called "fairway buoys," are at the outer eastern entrance of the channel. The one on the northerly side is red, the southerly one black. The channel buoys all have painted the letter G (signifying Gedney), and are marked on the chart as G.1, G.2, etc. The outer *can* buoys, in 1893, had no numbers. The buoyed channel is 1100 ft. wide dredged to a uniform depth of 27 feet at low water. More than a mile out to sea beyond the channel entrance, an automatic whistle buoy marks the prolongation of the centre line or axis of the channel. Within the bar at the other end the deep navigable water widens, and the Swash Channel diverges from the main ship channel.

It is doubtful if any port entrance equals Gedney Channel in exact definition, straight course, perfect buoyage and uniform depth, which is maintained by constant dredging.

Directly outside the entrance, is located the Station pilotboat, which anchors near black buoy No. 1 and sends out her small boats or yawls to take off the pilots of vessels that have been conducted out through the channel. A steamer approaching this channel from sea, if entering upon an angle, would naturally port or starboard to go on the starboard side, and steer a course along the red buoys.

The following is an official description of New York Lower Bay and Gedney channel:

"The main or Sandy Hook entrance into New York Harbor is one of the best in the world. The channel prior to 1884 was less than 24

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The following is an official description of New York Lower Bay and Gedney channel:

"The main or Sandy Hook entrance into New York Harbor is one of the best in the world. The channel prior to 1884 was less than 24

French passenger steamer was made out in the Main Ship Channel near the Southwest spit (Harpennau, p. 120). Waugh, the boatkeeper of the pilotboat *Driggs*, estimated that when the *Talisman* first took the pilot's line, the *Delaware* must have been five miles off, and that then she was pointing on the course for the channel (Waugh, pp. 55, 56). Harpennau admits that this was his course at that time (Harpennau, p. 115). The distance from the Sandy Hook Lightship to Buoy 1, Gedney Channel, is slightly over $4\frac{3}{4}$ miles. Pilot Harpennau claimed the rain squalls shut off his view ahead, so that he "could not see over a couple of ship's lengths during the thickest of it" (p. 115). Hence, to avoid the approaching tankboat he ported the *Delaware's* helm half a point (p. 115).

About half an hour after passing the Lightship, according to the estimate of Captain Thomas, of the *Delaware*, and while it was still rainy and thick, he tested his whistle, by blowing one blast (Thomas, p. 36). When the squall cleared up, the pilot found that the *Delaware* had gone to the northward and was a mile or so to the right of the whistling buoy, which then bore about S.S.E. (Harpennau, p. 115), and that the red buoy bore W. by S. On the chart it will be seen by the dotted line that N.N.W. from the whistling buoy to a point E. by N. from the red buoy will put the *Delaware* far to the northward of her proper course. At this time the red buoys bore on the *Delaware's port* bow estimated half a point.

The diagram from a photograph of the chart will show the headings of both vessels.

The tug *Talisman* at this time was about one-eighth of a mile from the line of the red buoys, towing the pilotboat towards her station. The *Delaware* was perhaps $1\frac{1}{4}$ miles away from the tug and showing it her port side. Soon after captain Winnett blew one blast of his whistle. He and others on the tug thought they heard an answering whistle, which possibly was the trial blast blown in the squall. The rain had been much heavier where the *Delaware* was. The sound of some other whistle may have suggested to Capt. Thomas to make trial of his own. His one blast was heard by four witnesses on the *Talisman*.

Walle, p. 8.
Falkenberg, p. 52.
Flannery, p. 64.
Winnett, p. 25.

Although they are not clear that it was an answer to their *first* whistle. Winnett thinks he did not see escaping steam, but only heard the sound (p. 25).

The pilot of the *Delaware* was trying to pick up the buoys which he had lost sight of in the squall. Mr. Cracroft, third officer, was told to look out for a buoy (p. 85). Seeing the buoy, he reported, "There is a buoy, sir, *and a vessel*" (p. 85), and he saw the outer red buoy No. 2 and the tug at the same time. The *Delaware* starboarded her helm one point to head W. by S. so as to bring this buoy on the starboard bow and enter the channel (p. 115).

Mr. Cracroft, the third officer, made no separate or further report of the tug and tow. The pilot did not come over to the starboard side of the bridge.

"He came over perhaps as far as the bridge compass, which is just amidships."

"Q. But no further than that? A. No." (Cracroft, p. 85).

The tug and tow continued to draw across the bow of the *Delaware*, heading about S. S.E., apparently unnoticed by the pilot. The third officer was asked :

"Didn't it surprise you a good deal that the pilot didn't give any orders? A. I was waiting for them.

"Q. Weren't you astonished at not getting any? A. I was there as a junior officer, and although I might have had my own thoughts about it, I wouldn't say anything" (Cracroft, p. 87).

Having taken a course for Gedney Channel angling 3¾ points, over one-ninth of a circle, to the south of the regular course, the pilot naturally was intent on making the black buoys. There was also an appearance of fog or showers ahead and further up the bay. The *Delaware* entered the channel, passing close to the red buoy, "within four or five feet" (Harpennau, p. 128).

The pilot's attention being off to the port in the direction of the black buoys, he let the *Delaware* continue on her angling course instead of porting and going up his proper side of Gedney Channel. While he was trying to pick up the black buoys, glass in hand, the *Talisman* sounded a second whistle (p. 121).

In the language of the *Delaware's* log-book:

"Captain Thomas *rushed* on the bridge." As he came up the steps of the ladder, he saw the *Talisman* close on the starboard bow. Rushing to Harpennau, Capt. Thomas said:

"What are you trying to do, Pilot?" (Harpennau, p. 120.) "Can you see that tugboat crossing our bow at right angles?" (Thomas, p. 38.)

Against the opinion of the pilot, who said they could not starboard (p. 122), the captain first ordered the helm hard a-starboard (Thomas, p. 42; Peyton, p. 104), which was instantly turned "by one of the biggest hydraulic engines" that "puts the rudder over in two or three seconds," so that the *Delaware* swung off two or three points (Thomas, p. 39). Harpennau gave the order "stop," which Cracroft transmitted on the engine room telegraph, and the order "full speed astern" followed, which was telegraphed by the captain. Even after the *Delaware* had first starboarded to head into the channel, Cracroft says that the tug bore only three points on the *Delaware's* bow (p. 73). The tug was observed to be then heading across the *Delaware's* course at about right angles; and she kept right on that course up to the time of the collision. Those on the *Edmund Driggs* and *Talisman* agree that the tug kept a straight course all the time till just before the blow.

Berry (p. 15), Waugh (p. 56), Winnett (pp. 26, 27).

Just before the collision the tug blew several short blasts, as a signal to let go the towline (p. 26), but the steamer kept swinging to port and struck the *Talisman* about fifteen feet from the stern. The

Delaware's stem penetrated the tug's port quarter so as to reach the steering rod, and probably the shaft, listing the *Talisman* heavily to starboard (Diagram, p. 68, showing angle of collision). The steamer continued to push the tug sideways through the water for a distance of about the *Delaware's* length, according to Capt. Thomas (p. 38), or about 300 feet, according to Capt. Winnett (p. 32), or 100 feet, according to Pilot Harpennau (p. 12), when the tug went down bow up (Winnett, p. 27). According to the official bulletin of the Lighthouse Board, issued two days after the collision, the wreck was buoyed as "between Nos. 1 and 3 (black) buoys, 160 feet N. N. E. of the line of the black buoys" (p. 29).

According to the pilot house clock, the collision was at three minutes after ten A. M. (Peyton, p. 103). The *Delaware's* log puts it at 10h. 4m. (p. 50).

A fireman, who was trying to cast off the towline, was drowned, Captain Winnett's arm was severely fractured, others had narrow escapes, and the tug *Talisman* became a total loss.

The place of collision was to the south of the centre line of the channel.

> Winnett, "about 400 feet N. N. W. of No. 1 buoy when she was struck" (p. 27). "I was looking right at the buoy and I judged it was from 300 to 400 feet southeast of her" (p. 27).
>
> Berry, on the pilotboat, says collision was a little over the centre of channel (p. 18); about 600 or 650 feet to southward of line of the red buoys (p. 19).
>
> Harpennau says "about 300, or say 500, feet of the line of the black buoy" (p. 125).

As the wreck-buoy was 160 feet from south line of the channel, and as the steamer pushed it less than her own length after the blow, the point of collision was evidently beyond the middle line of the channel. The *Delaware* had thus crossed over to the southwestern half of the channel, through the pilot's inattention. As 85 feet of the tug had passed the *Delaware's* stem, the remaining 15 feet of the tug, 90 feet tow line and the pilotboat 70 feet, in all made only 175 feet, which left between the stern of the pilotboat and the line of the red buoys *fully five hundred feet of clear water on the Delaware's proper side of the channel had she kept in her own water.*

No other steamers embarrassed the *Delaware*, which, besides having a 27-foot channel, 1,100 feet wide, also, by her light draught was free to go safely at least half a mile to the northeast of the red buoys.

PLEADINGS.

The libel, filed September 20th, 1893, alleged faults: (1) not keeping out of the way of tug and tow on the steamer's starboard side; (2) no proper lookout; (3) not obeying signals; (4) not porting the helm, but starboarding; (5) not stopping or backing; (6) too great speed (p. 3).

The answer filed October 28th, 1893, averred that the *Delaware* had not acceded to the tug's whistle, on account of risk of fouling the propeller in the chain of the outer can buoy, *and therefore held her course toward the southerly side of the channel* (Art. 7th, p. 5). It set up the tug's faults: (1) impeding the *Delaware's* course in Gedney Channel; (2) failing to slow, stop or reverse; (3) being improperly manned and equipped (Art. 8th, p. 5). Finally claimant pleaded in exoneration the Act of Congress of February 13th, 1893 (Art. 9th, pp. 5, 6).

There were examined in the presence of the District Judge Captain Thomas, master of the *Delaware*, and Captain Winnett, master of the *Talisman*.

Judge Benedict held the *Delaware* solely in fault. He said:

"When the *Delaware* approached near to the tug, the tug had reached the western side of the channel. The situation justified the pilot of the tug in supposing that the steamship would go under his stern or stop, and repelled any supposition that the steamship would pass ahead of him and over to the western side of the channel. If he had acted on such a supposition and stopped, he would have been in fault" (p. 132).

The Court also held that no blame could be cast on the engineer for running from the engine room at the last moment to save his life (p. 132).

As the Honorable Addison Brown had decided on December 18, 1893, in the *Viola* (59 F. R., 632), that the Act of February 13, 1893, did not absolve a shipowner from collision liability to other vessels, no argument on that defense was made in the District Court, and that plea was therefore not referred to in the opinion which was handed down in May, 1894.

The claimant appealed to the Circuit Court of Appeals. The assignments of error appear at pages 134, 135 of the record. The merits of the collision were so apparent from the answer, briefs, diagrams and oral statement of counsel that the Court declined to hear argument for the appellees, except on the question of the construction of the Act of Congress. The case involved injuries to person, as well as sinking the tug, and this was the first time the statute had been before that Circuit Court of Appeals as a collision defense, hence it was decided to certify the point to this Court (pp. 136, 137). Subsequently the whole record was ordered to be removed to this Court.

The fact that the crossing course of the tug and schooner was admitted by the pilot, who recognized the station boat, and knew she was going over toward her place outside the black buoy, that he failed to regard them till too late, that he violated the starboard hand rule; that in defiance of rule, statute, and good seamanship, he heedlessly navigated the *Delaware* out of her side of the channel, and after awaking to the situation was too dazed to act, when the master interposed and put the helm the wrong way—all made such cumulative fault, as to leave the *Delaware's* navigation beyond defense.

First.—The tug Talisman was not in fault.

She was not proceeding at full speed like the *Delaware*, but only between 4 and 5 knots an hour. The *Driggs*, towed astern, had her boat number, a large figure 7, on the mainsail, which told any pilot who would look in her direction, that she was bound out across the channel to her pilotage station. The *Delaware* was seen heading for the channel. Once inside the buoys, she should port her helm, and run the channel course parallel to the red buoys; and a navigator meeting the *Delaware* anywhere in the channel was bound to give her the

starboard side, and to assume that she would go there, when once she had rounded buoy No. 2.

A. The *Talisman* was not required to stop.

The contention of the claimant's counsel that under Rule 21, R. S., § 4233, the *Talisman* with her tow, should have stopped or reversed is not well founded, because.

The position of the tug, shape of the channel, and the duty of the *Delaware* to round into it, and pursue the channel course made no risk of collision or even apprehension. Instead of two vessels approaching in open waters, they came towards each other as in a river, where, although their directions may cross for a time, as soon as some intervening point is passed, they become meeting and not crossing, and each takes its own proper side of the fairway.

From the point of view of the tug, the *Delaware* was not "crossing," R. S., § 4233, rule 19, but practically "meeting," under rule 18. As Capt. Winnett testifies (p. 31). "I didn't dream there was going to be a collision." Pilot Berry did not think of any collision till the *Delaware* was three lengths off (p. 16).

This Court accepted and sustained the navigation of the tug *Hector* when it was struck by the tug *Mabey*, which had kept on a straight course, instead of rounding to and going under the stern of a sailing vessel as was nautical and customary. In excusing the tug *Hector*, this Court said in 1858 :

"The master of the *Hector* acted on the supposition that the *Mabey, according to custom, would round to*, and could not anticipate that, contrary to all rule, she would run into the *Hector*."

Sturgis *v.* Clough, 21 Howard, 451, 455.

This Court said in 1875 :

"It is contended that here was risk of collision ; that the propeller did not slacken her speed, or stop and reverse in time, and hence that she was also in fault, and the damage should be apportioned. A collision did certainly occur, but was the situation of the parties such that the principle of this article applied to the propeller? Does this article contemplate a case where a collision is the result of sheer negligence and disobedience of well known rules, or does it apply to cases where supposing the parties intend to perform and do reasonably perform their respective duties, the emergency is such that there

is still danger that a collision may occur?" (p. 205). "The appellants insist that the rule of law is this; that where a steam vessel is approaching another vessel and where a collision might be produced by a departure of the latter from the rules of navigation the former vessel is bound to slacken her speed or stop or reverse. We have examined with care the authorities cited by the appellants, but we find none that sustain this proposition. *The rule is otherwise.*"

The *Granite State*, 91 U. S., 200, 203, 205.

In 1878:

"The officers of the tug also perfectly understood that under the 18th of the same rules it was their duty to keep the tug on its course. The officers of each vessel had the right to assume that the other vessel would do its duty, and to make their course, and *keep their speed* upon that assumption."

The *Northfield*, 154 U. S., 629, 630.

In 1892 this Court said:

"We think that the keeping on of the tug at full speed of two miles an hour by the shore, and her not stopping or reversing her engine until the captain coming on deck ordered the mate to do so, was not a fault on the part of the tug. Knowing that the ship was a sailing vessel, from her showing to the tug only her red light and no white light, and further knowing that it was the duty of the tug to avoid the ship, and of the ship to keep her course, and the tug having ported her helm in discharge of her duty of avoiding the ship, *she naturally kept on without stopping or reversing, because under Article 18 it was her duty to slacken her speed or to stop and reverse, if necessary, only if her approach to the ship involved risk of collision.*"

The *Blue Jacket*, 144 U. S., 371, 391.

Again this Court said in 1893:

"The collocation of the rule and its direct reference to rules 17, 19, 21 and 22, plainly point to the meaning that while the other vessel must keep out of the way, the preferred vessel shall not interfere with or thwart the movements of such other vessel by bringing a new element into the calculation which would be done if, instead of pursuing her course, she stopped her headway."

The *Britannia*, 153 U. S., 130, 142.

Finally in 1894, the Court re affirmed its position:

"From this moment, at least, the statutory rules of navigation be-

came operative, and required the ferryboat to keep her course *and speed* and the *Breakwater* to keep out of her way (p. 263). * * * We think, however, the rule became obligatory from the moment the *Pavonia* got under way, and that it became her duty to keep her course *and speed*, and that of the *Breakwater* to avoid her" (p. 264).

The *Breakwater*, 155 U. S., 252, 263.

This doctrine so long announced by the Court also has received the high sanction of the Washington Marine Conference; and their regulation, formulated into a statute, expressly requires the privileged vessel to keep her course *and speed*.

Ch. 802 Laws of 1890, 26 Stat. at large, p. 327.

The authorities looking to the contrary are (1) English cases not followed in this Court,* (2) cases of steamers in *open water*, where the presumption is that the compass headings will be maintained, which, of itself, makes risk of collision if the speeds do not indicate that the privileged vessel can first safely get by the point of intersection, (3) where contrary whistles under the Inspectors' Rules have been given, (4) where through fog or other intervening object, the vessels suddenly are brought into danger, requiring both to stop, in order to avert striking one another.

B. The Talisman was not bound further to slacken speed. She was already going slow—4 or 5 knots, the least speed to keep con-

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* A useful comment on these decisions of the British Admiralty Courts is found in the remarks of Sir Charles Hall, Chairman of the British delegation to the Washington Conference.

"In Article 22 it is provided that the vessel, which is to keep out of the way, is to act as she thinks best to prevent collision, and the other vessel is to keep her course. There is no doubt, whatever, that this rule has been read and supposed by a good many sailors to be an instruction that she should not only keep her course but her speed; and it has been frequently argued by them that it is the better course for them to pursue, because if they not only keep their course, but keep their speed also, they enable the vessel that is to keep out of their way to more easily avoid them by passing under the stern. Now *by the interpretation of the rule in our Courts* that injunction that the vessel is to keep her course has been decided to mean that she is only to keep her course, but shall not keep her speed, because the rule does not say so." * * "Now with regard to Article 18, reading it in connection with Article 22—so far as we can get at the preponderance of opinion of sailors, it is that it is safer for a vessel which keeps her course, to keep also her speed, and for this reason, the vessel which has to keep out of the way ought to know what the other vessel is doing." Prot. Int. Marit. Conf. Vol. I., pp. 104, 105.

trol of her tow. It was entirely clear weather and her duty was to cross to the station.

C. The special circumstances invoked under Rule 24 required the *Talisman* to go on.

1. When the first apprehension arose, the tug and tow were in the channel, the *Delaware* not over three lengths off. Had the *Talisman* stopped then or before she would herself have been at fault.

> The *Northfield* and the *Hunter*, 4 Ben., 112, affirmed, 154 U. S., 629.

Her duty was to keep on and leave the *Delaware* an unobstructed passage on the proper side of the channel.

2. The *Talisman* having already crossed the direction of the *Delaware's* heading could not anticipate the fatuity of a starboard helm, by the master of the latter, to follow him up.

Despite the evidence of Captain Thomas, that the *Delaware* did answer her helm and swing to port, appellants' counsel argues to the contrary—opposing a book theory against the incontrovertible admissions of his own witnesses.

As to this:

a. The helm action preceded any effect of the reverse screw.

By the steam steering gear, controlled from the bridge, the rudder was put over almost on the instant. To the engineers orders had to be first repeated to an officer at the telegraph, by him transmitted to the engineroom, and the order "stop" had first to be obeyed before the order to back. Although the time of collision was 10h. 3m. by the pilothouse clock (Peyton, p. 107), that was the time when the order full speed astern came to the engineroom (Neisch, p. 48).

b. The light draught forward—only 12 feet—enabled the *Delaware* to turn quickly.

c. After such a helm order, it would be natural and almost mechanical to watch the effect. Capt. Thomas, who gave the order, saw the swing of from 2 to 3 points.

d. The previous course of W. by S. from four or five feet from the first red buoy (where the pilot says the *Delaware* passed), requires a change of two points to bring the *Delaware* to the place of collision.

The blue print here inserted is appellants' own diagram in the Court below—with dotted lines added by appellees' counsel, putting the *Delaware* near the buoy to conform to her answer and testimony.

e. Not a person from the *Delaware* denies the swing, although naturally they cannot give the angle with the precision of Capt. Thomas.

f. Nothing is proved by the supposed angle of collision. With the *Talisman* going down under their feet, little heed was paid by libellants to angles or compass headings !

3. Risk of accident did not arise till the tug was *in extremis.* At the *Delaware's* speed of nearly 10 knots, she went nearly 1000 feet a minute, and it was not more than a minute before the collision that there was any apparent danger.

4. Article 21 of the International Rules (23 U. S. Statutes at large, Chap. 354) required the tug *to go* to " that side of the fairway or mid-channel which lies on the starboard side of such ship," and if she was ever absolved from that duty, it was not until the steamship suddenly turned off from her own proper path on the northerly side by the red buoys.

5. Before there were any International Regulations the State of New York had passed a law in 1826, providing :

" Whenever any steamboats shall meet each other on the waters of the Hudson River, *or on any other waters within the jurisdiction of this State*, each boat so meeting shall go towards that side of the river or lake which is to the starboard or right side of such boat so as to enable the boats so meeting to pass each other with safety."

1 N. Y. Rev. Statutes, *683, Ch. XX., §1.

It has been found that the place of collision was within three miles of land, and hence within legislative jurisdiction.

To go on, therefore, by the tug was to take herself and tow out of the path of the *Delaware*, by going to that side of the channel appropriated for the tug and excluded from the *Delaware*, by usage regulations, State statute and good seamanship.

The case is even stronger than the *Servia*, 149 U. S., 144.

On the whole situation it is the law, as stated by the learned District Judge :

" In my opinion it would have been a fault on the part of the tug to have stopped under the circumstances" (p. 132).

D.—The *Talisman* made no error in keeping her course.

The argument was first made on appeal that, having blown a single blast of the whistle, the *Talisman* should have ported her helm, although the regulations required her as a privileged vessel to keep her course.

This attempt to make Captain Winnett the victim of a strained application of the International Rules cannot prevail, because :

1st. No such fault was pleaded in the answer or suggested in the testimony of those navigating the *Delaware.*

2d. The whistles blown by the tug were entirely unheeded, and, therefore, could not have misled the pilot of the *Delaware.*

3d. The whistles, if heard, would not have imported to the pilot of the *Delaware* any intention of change of course. As was said by Judge WALLACE :

" Neither pilot supposed that the signals were given comformably with that article, but each supposed that the signal of the other was one given pursuant to the rules of the supervising inspectors. Neither was misled by the signal of the other, but each understood it according to its intended significance."

The *Lisbonense*, 11 App. Cas., 709.
See Harpennau, (p. 116).

In the *E. H. Coffin*, 9 Ben., 20, 8 Fed. Cas., 372, Justice BLATCHFORD said :

" Although the *Coffin* got no response to her first signal of one whistle, yet she had a right then to keep on, for she had a right to suppose that she was seen by the *Christian*, and that the *Christian* would in season take measures to avoid her ; and *her signal of one whistle was an indication that she was intending to do what the law required her to do, that is, keep her course and not change it.*"

In affirming this decision, Chief Justice WAITE said:

"The obligation of the *Coffin* to keep her course was as imperative as that of the *Christian* to keep out of her way." (16 Blatch., 421, 8 Fed. Cas., 374.)

4th. Congress never intended to give this meaning to whistles blown in narrow waters. The latest enactment of this statute (Chap. 41, Laws of 1895), entitled "An Act to regulate the navigation on the Great Lakes and their connecting and tributary waters," approved February 8, 1895, contains this article in the following form:

RULE 23. In all weathers every steam vessel under way, in taking any course authorized or required by these rules, shall indicate that course by the following signals on her whistle, to be accompanied, whenever *required* by corresponding alteration of her helm; and every steam vessel receiving a signal from another shall promptly respond with the same signal or, as provided in rule twenty-six:

One blast to mean, "I am directing my course to starboard."

Two blasts to mean "I am directing my course to port." *But the giving or answering signals by a vessel required to keep her course shall not vary the duties and obligations of the respective vessels.*

While this can have no retroactive effect, and is not strictly applicable to New York lower bay, where this collision occurred, it is itself a valuable legislative comment on the text of this provision of the International Rules.

Certainly this Court will not hold such a whistle blown to warn an approaching vessel to be a fault—when not even the navigators of the other vessel are heard to complain of this effort to caution them to keep on their proper side of the channel.

E. The *Delaware's* fault sufficiently accounts for the collision.

Fault, sudden, fatuous, and indefensible, stands admitted against the *Delaware*.

In the last sixty seconds before the blow—that eventful minute when the unexpected was happening—it is sought now to find ground to fasten contributory fault upon Captain Winnett, hampered by a tow astern, in imminent peril of his life.

This is quite parallel to charging fault and demanding an apportionment of damages because at a "critical moment" the engineer left the

engineroom to save his life (p. 132), which was also again asserted in the assignment of errors (p. 135).

In the *City of New York*, 147 U. S., 85, this Court said :

"Where fault on the part of one vessel is established by uncontradicted testimony, and such fault is of itself sufficient to account for the disaster, it is not enough for such a vessel to raise *a doubt* with regard to the management of the other vessel."

Here the points attempted to be raised are: Whether captain Winnett could *foresee* danger in a 1100-foot channel, before the *Delaware* had entered it, or if he could do more to *avoid* danger, than he did, after the *Delaware* suddenly started across it.

Has the appellant raised even a doubt?

The four learned Judges who have examined the case in the Courts below have found a bare inspection of the diagrams and the channel chart sufficient to vindicate the navigation of the *Talisman*, without argument for the appellees.

Second.—CH. 105, LAWS OF 1893, DOES NOT TAKE AWAY THE LIABILITY OF A VESSEL FOR DAMAGE DONE TO ANOTHER VESSEL BY COLLISION AT SEA.

The statute is printed *in extenso*, as Appendix C. (p. 39).

The word "collision" nowhere appears. The claimant relies on the terms of § 3, declaring that neither the vessel, her owners, agent or charterers "shall become or be held responsible for damage or loss resulting in faults or errors in navigation or in the management of said vessel."

The testimony from London introduced by the claimant, that the owner had exercised due diligence to make the *Delaware* in all respects seaworthy and properly manned, equipped, and supplied, has not been contradicted by libellants.

Is it possible that these expressions in the body of this statute cover the case of a wrongful collision and the resulting damage to an innocent vessel? Has the common law remedy for damage by collision at sea been destroyed by this act?

The primary guide in construction is to ascertain the intent or purpose of Congress in passing the act.

"But that which helps us most in the discovery of the true meaning of the law is the reason of it, or the cause, which moved the legistor to enact it." *Pufendorf*, Law of Nature and Nations, Book V., Ch. XII, § 10, Kennett trans., London (1729).

A. Reform in bills of lading was the cause of this statute.

The causes which brought about this new legislation are to be found in the endeavors for ten years before 1893 to establish some settled rule, deciding how far exceptions should be inserted in bills of lading, and defining the rights and duties of carriers by sea.

Congress attempted to give a definite solution of what had become an international question. Instead of holding the common carrier by sea as under a public duty, and unable to stipulate in a bill of lading against the negligence of his servants, which has been the settled doctrine of this Court (R. R. Co. *v.* Lockwood, 17 Wall, 37; the *Montana*, 129 U. S., 397), the result of the struggle in Europe has been generally in favor of liberty of contract. What was stipulated in the bill of lading became the law of the parties. Naturally great abuses have followed. As judgments went against vessels, the shipowner introduced new terms into bills of lading to meet the new liabilities disclosed by judicial decision. In England, especially, the bills of lading became overweighted with unreasonable exceptions, so that the vessel has even been protected from unseaworthiness, bad stowage, and insufficient dunnage, in bills of lading that passed the scrutiny of careless merchants, who are unable to examine documents containing fifty or sixty lines of closely printed conditions and exceptions.

In 1881, the late Mr. Richard Lowndes, the author of treatises on Average, Collisions, and other works, started a movement at Liverpool, with a view to arrive at a general agreement upon the terms that should fairly go into a bill of lading.*

A committee from the Liverpool Chamber of Commerce submitted a model form of such a contract to the Association for Reform and

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*Restrictions by Contract upon the Liability of shipowners as Carriers of Goods, by J. E. Gray Hill, (London, 1891).

Codification of the Law of Nations at the meeting in 1882. After general discussion the following principle was adopted :

RESOLUTION OF 1882.

"That the principle of the common form of Bill of Lading should be this: That the shipowner, whether by steam or sailing ship, should be liable for the faults of his servants in all matters relating to the ordinary course of the voyage, such as the stowage and right delivery of the cargo, and other matters of this kind; but, on the other hand, the shipowner should be exempt from the liability for everything which comes under the head of 'accidents of navigation,' even though the loss from these may be indirectly attributable to some fault or neglect of the crew."

In 1885 this point was again considered by the same Association, at the Hamburg meeting, which limited the exception to "errors in judgment of the master, officers and crew."

The Liverpool committee having entered into correspondence with the New York Produce Exchange in 1886, a proposed bill of lading was framed by the latter body as a result of the negotiation.

Meanwhile in France the subject was agitated by petition to the government by M. Felix Faure (now President of France) and others, in 1886, that those dispositions in bills of lading which tended to deprive shippers of proper protection should be annulled by statute.*

The International Congress held at Antwerp in 1887 discussed the same subject, with the result of a vote against the negligence clause and a prohibition to shipowners against exempting themselves from "improper stowage, care, or incomplete delivery of the merchandise committed to their charge (*par vice d'arrimage, défaut de soins, ou incomplète delivrance des marchandises confiées à leur garde.*")†

At a meeting of the Association for Reform and Codification of the Law of Nations, held at London, 1887, in which delegates from United States took part, the proposal of that same body in 1882 was, however, again adopted.

In July, 1888, what was called the Northern Maritime Conference assembled at Copenhagen, consisting of delegates from Sweden, Nor-

*Annales de droit commercial, 1895, p. 157.
†*Solutions du Congres*, in Valroger *Droit Maritime*, Vol. v., p. 397.

way, Finland and Denmark, and among other points discussed the principle of bill of lading reform, twice adopted by the English association. In the publication by their committee they stated:

"By this resolution, a result has been arrived at which on the whole agrees with that which in the meantime had been attained by similar transactions in the United States of America, and which in our opinion is as good as it is possible to attain by private exertion, as the shipowners retain liability for everything respecting the equipment and seaworthiness of the ship, the stowing, preservation and proper delivery of the cargo, but are exempted from all consequences of accidents occurring during the voyage, whether they are a consequence of *vis major*, or of the faults or errors of the master or crew."

Memorandum prepared by Committee of the Second Northern Maritime Conference, p. 33 (Copenhagen, 1888)

Gradually this principle was accepted by commercial bodies such as the New York Produce Exchange, the general rules for steamship bills of lading adopted by the Chambers of Commerce of Hamburg and Bremen, and the "1891 American Cotton Conference bill of lading;" It was thus becoming generally recognized as effecting a fair division of risks between the shipowner and the cargo insurer.

The necessity for legislation became the greater from the fact that the "law of the flag" clause, on which British shipowners had been relying since the *Montana* case, had been several times rejected in our courts, as an attempt to impose upon the carrier's contract, a construction which the United States law deemed contrary to public policy and therefore void.

In October, 1892, the Association for Reform and Codification of the Law of Nations met at Genoa, and in an address there by Mr. McArthur, of Liverpool, he stated:

"In view of the foregoing decisions it is not surprising to find that there is a desire in the United States that the stringency of the law should be somewhat relaxed in favor of the shipowner. A bill has been introduced into Congress, which has been favorably reported upon by a committee of the House of Representatives, by which it is proposed that the shipowner shall be relieved of all responsibility for loss or damage to cargo resulting from error of judgment in the navigation or management of the vessel, if it is proved that she was in all respects seaworthy on sailing. On the other hand, it is to be declared unlawful for any common carrier either by land or

water, to insert in any bill of lading or shipping document, any clause or agreement whereby the carrier shall be relieved from liability for loss or damage arising from negligence or failure to properly load any merchandise or other property committed to his charge; nor shall it be lawful for the carrier to limit his liability to less than a full indemnity to the claimant for any loss or damage sustained. The bill further provides that it shall not be lawful to insert in any bill of lading of any vessel plying between the United States and foreign countries, any agreement whereby the obligation of the shipowner to properly equip the vessel shall in any wise be lessened." *

After further discussion of the subject of bill of lading reform, the conference passed a resolution favoring further "endeavor to formulate certain rules on the basis of the resolution passed by the association in 1882, and reaffirmed at the conference of 1887."

This somewhat discursive review of the efforts of mercantile bodies to harmonize the divergent claims of merchant and shipowners shows that a practicable basis of agreement had been reached, at least by the associations in the great maritime centers.

This work and negotiation by private bodies slowly formulating an important legal principle (compared by a distinguished writer to the development of legal ideas described in Maine's Ancient Law †). finally met with legislative response and ratification.

B. Congressional proceedings leading to enacting the statute of Febry. 13, 1893.

On June 10th, 1892, Mr. M. D. Harter, of Ohio, offered in the House of Representatives a bill (H. R., 9176) "relating to contracts of common carriers and to certain obligations, duties and rights in connection with the carriage of property," which was referred to the Committee on Interstate and Foreign Commerce (Cong. Record, 52d Cong., 1st session, p. 5228).

This committee reported favorably on the bill July 21, 1892, which was referred to the House Calendar and ordered to be printed. (Cong. Record, 52d Cong. 1st Session, p. 6529.)

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* Association for Ref. & Cod. Law of Nations. Report of the 15th Conference at Genoa, pp. 91, 92.

† The Modern Law of Carriers, p. 347, by Everett P. Wheeler, New York, 1890.

On December 14, 1892, the measure came up for discussion. The House Committee reported the act as dealing with bills of lading, and stated the abuses which bills of lading issued by steamship lines had imposed on shippers.

This report appears in full as Appendix A.

In further discussion on December 15th, Mr. Coombs, of New York, said:

"I have had communications from English shippers and bankers, as well as from bankers in our own country, praying that some action may be taken by Congress whereby a bill of lading shall entail some responsibility on the part of the vessel. I will point to one of the exceptions embodied in many, if not all, of the modern bills, that in which they disclaim any responsibility for damage arising from defective stowage of cargo. The shipper does not stow the cargo or have anything to do with it—neither as to the manner of stowing it or its position in the vessel; he cannot influence or direct it, but it is done by the employee of the owner of the vessel, and he certainly should shoulder the responsibility, and not evade it by forcing the acceptance of a bill of lading whereby he is relieved of penalty for any error that he may make." (Cong. Record, 52d Cong., 2d Session, p. 171.)

Mr. Harter said:

"Those living in Europe who receive their goods from us over these steamship lines, and who are the coadjutors, the helpers and aids of our American export trade, are a unit with us. The Boards of Trade of Glasgow, the Chambers of Commerce of London and Liverpool unite with the American shipper and exporter in the demand that this bill shall become law." (Cong. Record, 52d Cong., 2d Session, p. 172.)

On December 15, 1892, the bill passed the House (Record, p. 173) and was, on December 20th referred to the Senate Committee on Commerce (Record, p. 229). On January 28, 1893, that committee reported back the bill with amendments (Record, p. 901; see these amendments in Appendix B, p. 36), which were agreed to on February 4, 1893, when the amended bill passed the Senate, and the usual conference committee was appointed (p. 1181). On February 7th, the bill, with Senate amendments, came back to the House. Mr. Lind, of the committee in charge of the bill, said:

"One important new feature is presented by the Senate amendments. As the law now stands, American vessels are subjected to certain hardships, from which they cannot exempt themselves by contract or otherwise, to which foreign vessels are not subjected. A foreign vessel, of course, can contract with a shipper and make provision against any liability on its own part for the negligence of its masters or owners; but the object of this bill is to limit this right. An American vessel cannot make any such contract or absolve itself from any such liability, for the reason that it is always amenable to the Federal Courts, and the Federal Courts have always held that contracts of that character are against public policy. Those who are more familar with the matter of ocean navigation than I– especially the gentleman from Maine (Mr. Dingley), have agreed with me that it was well demonstrated in the Senate committee at the hearings which I attended, that the law as applicable to shipping in the United States ought to be somewhat more liberal than it is at present. Now, after a master, owner or charterer has taken every precaution that human ingenuity can suggest in equipping, manning, and in furnishing his vessel, nevertheless, if out on the high seas, in stress of weather, or in storms, when every man is worn out with watching, if a man falls asleep on the watch, or commits any fault of navigation whereby injury results, the master, owner or charterer is held responsible under the law. To this extent the bill relieves domestic shipping from these burdens. It provides that where the owner or owners, the charterer or the master have exercised due diligence in properly equipping, manning and stowing, making the vessel in all respects seaworthy——

Mr. Dingley: And properly navigating.

Mr. Lind: And properly navigating, then they shall not be liable for faults or errors of navigation solely. Now, this is absolutely the only new feature of the bill except one other."

After referring to the amendment touching live stock shipments, Sec. 7, he continued:

"I am ready to answer any further question with reference to the bill. I want to say also that, in its present form, it was satisfactory to the American shippers represented, it was satisfactory to the legitimate and honest steamboat interests, and it was unanimously favored by the Senate committee" (Record, pp. 1291, 1292).

Accordingly the House concurred in the Senate amendment (p. 1292), and on the next day, February 8th, the bill was signed by the Speaker and by the Vice-President (p. 1321), and on February 13th, was approved by the President (Record, p. 1603).

It is thus seen that in the original bill, the report of the House

Committee, and in the amendments shown by the journals of the two Houses of Congress, there was never expressed an intent to change the established lien for reparation of collision damages.

C. The legislative intent is to be gathered, not from section 3d alone, but from the whole act, and its purpose should not be extended beyond that which clearly appears from its provisions. Ins. Co. *v.* Hamilton, 12 App. Cas., 484,490; U. S. *v.* Collier, 3 Blatch., 332.

The clause relied upon is but a single line of the third section of the act, which section also contains seven other distinct exceptions—all of which are plainly recognizable as the ordinary bill of lading provisions. Not only, therefore, does the appellant's theory, based upon the third section, need to be most tenderly handled, but the counsel is constrained to leave out altogether the other parts of the act—" the first and second sections not being germane to this argument " (Appellants' brief, Point IV., p. 72).

It is respectfully submitted that an argument, which assumes that the whole statute is not to be taken into account, but an interpretation applied to seven or eight words, wrested from their context, is contrary to the authority of this Court.

Atkins *v.* Disintegrating Fibre Co., 18 Wall, 272, 301.
U. S. *v.* Landram, 118 U. S., 81.
Sedgwick, Inter. & Const. Statutes, 2d Ed., p. 200.

The first section obviously relates to carrier's contracts, and is directed against any provisions which will relieve the owner from negligence, fault or failure in proper loading, stowage, custody, care or proper delivery of merchandise or property.

The liability referred to concerns only cargo laden on board and shipping receipts and bills of lading given by the vessel to the shipper, and limits the exceptions that may be lawfully made between them, and has no reference to any other subject.

The second section is limited to the same matter, and applies to the equipping, manning, provisioning and fitting out of a vessel, to make her seaworthy, and declares it shall not be lawful for the shipowner to contract himself out of these duties, or lessen, weaken or avoid the duties of master, officers, agents or servants, carefully to handle and stow the cargo and care for and poperly deliver it.

No question arises as to the scope of this section which has refer-

ence merely to the preparation of the ship for the cargo and the care of it when on board.

The third section, continuing the same subject, does not say what exceptions the carrier may lawfully make, but declares his liability and the exemptions, by force of the statute itself, and not by virtue of a contract. In the event of the owner having taken care to prepare his ship (which must be transporting merchandise or property to or from, or in this country) and have her properly manned, equipped and supplied, neither the vessel nor her owner, etc., shall be liable for damage or loss resulting from faults or errors in navigation or in the management of the vessel, nor for dangers of the sea or navigable waters, acts of God, or public enemies, or the inherent defect, quality, vice, of the thing carried, or insufficiency of package, or seizure under legal process, or any loss resulting from any act of the shipper or owner of the goods, or from deviation for salvage of life or property at sea.

Here also the mutual relations of cargo and shipowner only are the subject of legislation. Like the first two sections the matter dealt with is the carriage of cargo. As the first were prohibitory and annulled certain objectionable clauses, this section sets forth the shipowner's rights and exemptions in case he has exercised proper care to prepare his ship. If it were merely permissive of what exceptions might lawfully be inserted in a bill of lading, all cavil and doubt would cease. But because it is declaratory of the mutual rights and duties, it is claimed, that the words "faults or errors in navigation or in the management," when taken from their context, have absolved vessel-owners from collision liability to other vessels.

It is an elementary principle that general words in an act must be limited to those objects to which the Legislature intended to apply them.

All of the following clauses of the section are but an enumeration of the familiar exceptions in bills of lading. All have the same purpose of defining the responsibility of a carrier for loss of or damage to cargo carried. The close inter-relation of these clauses precludes the idea that collision liability to other vessels is intended. On this third section alone such an extension of the word "faults" is unreasonable and a violation of the elementary canons of statutory construction.

In re Hohorst, 150 U. S., 660.

The fourth section, still continuing the subject of the obligation and rights of a carrier of cargo, lays down the duty to issue bills of lading, prescribes what they shall state, and the effect of them as evidence, and section five imposes a penalty for violating any provisions of the act.

The sixth section, in the nature of a proviso, saves the statutes of limitation of liability, and the seventh section excepts the carriage of live animals from the act.

Taken as a whole, it is respectfully submitted that no serious question of construction can arise, that the statute was not intended to touch and does not touch the liability of one vessel to another for damages arising from collision of two vessels at sea.

There is no connection between minute provisions for the owner's care of cargo and his freedom from collision liability to another vessel. Can Congress be charged with the absurdity of saying to a shipowner "Be careful about your stowage and dunnage, and you will be free from liability to the cargo on board, and likewise exempt from paying for running down and sinking any vessel you may negligently collide with on the voyage?"

If the collision liability were done away with, why should Congress so sedulously guard and retain Sects. 4281–83 of the Revised Statutes limiting the liability of a shipowner in cases of collision?

Instead of being utterly subversive of the ancient law of the sea, of leaving all shipping at the mercy of the larger and stronger—and so introducing anarchy in place of the rule of the road—the statute viewed as a whole, is merely a *carrier's* act defining their contracts, obligations and liabilities.

D. The title of the Act amended in the Senate cannot aid the appellant's contention.

Of all legislative acts, those by Congress are least limited and interpreted by the title, which is often accidental.

U. S. *v.* Union Pacific R. R., 91 U. S., 72, 82.

In U. S. *v.* Hedden, 5 Wall, 107, 111, Mr. Justice Field said:

"Originally in the English Courts the title was held to be no part of the Act. 'No more,' says Lord Holt, 'than the title of the book is part of the book.' It was generally framed by the clerk of the House of Parliament where the act originated, and was intended only as a means of convenient reference. At the present day the title constitutes a part of the act, but it is still considered as only a formal

part; it cannot be used to extend or to restrain any positive provisions contained in the body of the act. It is only when the meaning of these is doubtful that resort may be had to the title, and even then it has little weight. It is seldom the subject of special consideration by the legislature. These observations apply with special force to acts of Congress. Every one who has had occasion to examine them has found the most incongruous provisions having no reference to the matter specified in the title. Thus the law regulating appeals in Mexican land cases to the District Courts of the United States from the board of commissioners created under the Act of March 3, 1851, is found in an act entitled: 'An act making appropriation for the civil and diplomatic expenses of the government for the year ending June 30, 1853, and for other purposes.' The law declaring that in the courts of the United States there shall be no exclusion of any witness on account of color, nor in civil actions when he is a party to or interested in the issue tried is contained in the proviso to a section in the appropriation Act of 1864, the section itself directing an appropriation for detecting and punishing the counterfeiting of securities and coin of the United States."

The very law, quoted at p. 63 of Appellants' Argument, might be added to Mr. Justice Field's illustrations. Right in the body of an act, entitled "An act making appropriations for the construction, repair and preservation of certain public works on rivers and harbors, and for other purposes," comes a penal statute imposing fine and imprisonment.

E. Congress cannot be deemed to have abrogated the common law by implication.

Chief Justice Waite said:

"That there has always been a remedy at common law for damages by collision at sea cannot be denied."

Schoonmaker *v.* Gilmore, 102 U. S., 118.

More than a common law remedy—this court calls it "the *natural right* of the injured party to compensation."

The *China*, 7 Wall., 53, 63.

"For it is not to be presumed that the legislature intended to make any innovation upon the common law, further than the case absolutely required." 1 Kent Com., *464.

Where a statute declared that bills of lading should be negotiable *in the same manner as bills of exchange*, this Court said:

"No statute is to be construed as altering the common law further than its words import. It is not to be construed as making any innovation upon the common law, which it does not fairly express. Especially is so great an innovation as would be placing bills of lading on the same footing in all respects with bills of exchange not to be inferred from words that can be fully satisfied without it." Shaw *v.* Railroad Co., 101 U. S., 557, 565 (1879.)

See also McCool *v.* Smith, 1 Black., 459.

Can the innovation of making bills of lading negotiable so as to shut off defenses, compare with that astounding and revolutionary wiping out of all responsibility for safe navigation at sea, which the construction contended for would accomplish?

In certain countries, like Sweden, bills of lading have had the character of negotiable paper, but what maritime people have ever declared that vessels guilty of collision and navigated by the shipowner's servants, should enjoy absolute immunity from making recompense to the party injured?

F. While the Court can find abundant cause for the Legislature to regulate the contracts of carriers, and restrain them from making unjust exemptions, there has never been any "mischief" to be remedied as to collision at sea, and the public have no grievance in the present remedy by admiralty, by a lien *in rem* against the delinquent vessel.

On the contrary, the recent effort of all maritime countries, and the joint work of the Washington Maritime Conference of 1890, was to make and enforce more strict rules of the road at sea, and give greater protection to property from tortious collision. While the law of carrier's contracts is universally unsatisfactory, and complaints are made for relief, nowhere is it proposed to relax the present collision regulations, enforced, as they must always be, by action against the owner or master, with damages collectible from the *fortune de mer*.

Counsel finally presses the Court (brief, pages 87–90) to follow the English case of Carruthers *v.* Sydebotham, which gave immunity to damaging vessels, under a broad construction of the Pilotage Act of George III. That doctrine was long opposed in the Admiralty. After careful examination, the whole principle was rejected and repudiated by this Court, which expressly approved the judgment of Sir Robert Phillimore, that such a blotting out of the natural responsibility of the shipowner for injuries done to the property or persons of others "is fruitful of injustice."

The *China*, 7 Wall, 53, 64, 66.

G. If an exemption for collision liability were ever to be made, it should be general. All vessels would be free under the statute whether carrying passengers, tugs, or mere pleasure yachts.

But the third section is restricted only to the case of a vessel "transporting merchandise or property"—a carrier.

This section is still further limited to trade with ports of this country. As a carrier's act such a qualification is natural. But if dealing generally with navigation and collisions it is unreasonable, even to vessels of the United States. Suppose one of our ships is in trade between Halifax and Havana, is there any reason why the owner should not have the same freedom of navigation as if his vessel were plying between Halifax and Boston?

Even without reference to the journals of Congress, the conclusion is irresistible that the law is looking primarily at our own position as cargo owners, and regulating that alone, and never intended to sweep away in an incidental manner nine-tenths of the liabilities of ship owners.

H. The Admiralty courts have uniformly held the statute to be a carrier's act, and not applying to claims for collisions to other vessels.

The *Viola*, 59 F. R., 632.
" " 60 " 296.
The *Silvia*, 64 " 607; 68 F. R., 230.
Calderon *v.* Atlas Co., 64 F. R., 874.
The *Etona*, 64 F. R., 880.
The *Millie R. Bohannon*, 64 F. R., 883.
The *Sintram*, 64 F. R., 885.
The *Florence*, 65 F. R., 248.
The *Energia*, 66 F. R., 604.
The *Richard Winslow*, 67 F. R., 250.
The *Carib Prince*, 68 F. R., 254.
The *Mary L. Peters*, 68 F. R., 919.
Hine *v.* N. Y. & Bermudez Co., 68 F. R., 920.

In the *Viola*, *supra*, Judge Brown said:

"Upon these maxims of construction the general words of Section 3 should be limited to the subject of the act, as shown by the words that precede and follow the clause in question, viz.: 'the mutual rights and obligations between the carrier, the carrying vessel and the goods

carried.' The third section is, moreover, expressly confined to 'vessels transporting merchandise,' thus apparently excluding tugs, passenger vessels and possibly vessels in ballast. Had the statute designed a change in the general principle of maritime responsibility, such an exclusion would not have been probable" (p. 635).

Third.—THE OWNER OF THE DELAWARE CANNOT INVOKE THE ACT OF FEBRUARY 13, 1893.

I.—The vessel was not transporting merchandise or property.

She was light in ballast.

In any view, the *Delaware* was not within the scope of the act which applies only to a vessel which at the time is a carrier of goods.

The terms "transport," "transporting" and "transportation" have a technical sense in the laws of the United States and are applied to conveyance of goods or persons for hire.

Rev. Statutes, U. S., § 2990-2997; 3000-3008; 4252-4278.

To put vessels in ballast within the act would be a wide enlargement of its terms, which is not permissible in such a statute in derogation of common right and an innovation upon the common law.

The *Main*, 152 U. S., 122.

II.—The same rules of statutory construction would apply to the question of a foreign corporation claiming this exemption, and the policy of the United States to hold vessels liable for collision, while in the hands of a compulsory pilot.

III.—A further consideration is the imposition of a penalty by § 5 which could not be enforced as against foreign ships that did not load in American ports.

Lastly.—THE DECREE OF THE DISTRICT COURT SHOULD BE AFFIRMED WITH INTEREST FROM AUGUST 7TH, 1894, WITH COSTS, IN THIS COURT, AND IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

Jan. 3, 1896.

HARRINGTON PUTNAM.
Advocate.

Appendix A.

REPORT OF HOUSE COMMITTEE ON THE HARTER BILL, DECEMBER 14, 1892.

The Committee on Interstate and Foreign Commerce, to whom was referred the bill (H. R. 9176) relating to contracts of common carriers and to certain obligations, duties and rights in connection with the carriage of property, submit the following report:

Our exports of domestic grain and flour during the fiscal year ending June 30, 1892, were as follows:

ARTICLES.	QUANTITY.	VALUE.
Barley.....bushels	2,800,075	$1,751,445
Corn.....do	75,449,849	41,590,460
Cornmeal.....barrels	287,607	919,961
Oats.....bushels	9,435,078	3,842,559
Oatmeal.....pounds	20,907,662	555,957
Rye.....bushels	12,040,716	11,433,160
Rye flour.....barrels	4,543	22,461
Wheat.....bushels	157,280,351	161,399,132
Wheat flour.....barrels	15,196,869	75,362,283
Total.....		$296,877,418

Constituting, as it does, our great staple of export by the side of cotton, an imperative duty rests upon Congress to pass such legislation as may be necessary to remove from this trade all unnecessary burdens and restrictions. In former times, grain and flour were carried by sailing vessels, the masters of which never refused to grant bills of lading acknowledging that the goods intrusted to them for transportation were received in good order and condition, if such was the case, and undertaking to deliver them at the port of destination in the like condition unless prevented from so doing by losses arising from dangers of the sea, acts of God, or public enemies. Such exceptions are fair and reasonable, and cannot be complained of.

But latterly almost the entire carrying of grain and flour from the United States to Europe has been absorbed by steam vessels belonging to a few large and powerful corporations, and it is not overstating the facts when we say that these steamship companies have now as complete a monopoly of this trade—at least from the Atlantic seaboard—as if there were no other craft afloat.

The manner in which they impose upon our shippers and the unreasonable conditions which the companies compel them to agree to are so tersely

and graphically set out in a petition recently addressed by the Glasgow Corn Trade Association to the Marquis of Salisbury that we quote from it as follows :

"That, taking advantage of this practical monopoly, the owners of the steamship lines combined to adopt clauses in their bills of lading, very seriously and unduly limiting their obligations as carriers of the goods, and refused to accept consignments for carriage on ony other terms than those dictated by themselves.

"That this policy has been gradually extended by the steamship owners until at the present time their bills of lading are so unreasonable and unjust in their terms as to exempt them from almost every conceivable risk and responsibility as carriers of goods.

"For example, many of these bills of lading provide, in addition to the usual and reasonable exceptions, that the carriers shall not be liable for loss or damage occasioned by negligence of the master, pilot, stevedores, crew, or others in their employment; nor for bad stowage; nor for defect or insufficiency of the hull, machinery, or fittings of a vessel, whether occurring before or after receiving the goods on board; nor for the admission of water into the vessel by any cause, and whether for the purpose of extinguishing fire or for any other purpose, and whether occurring previously or subsequently to the vessel's sailing; nor for the differences between the quality, marks, or brands of flour or other goods shipped and those of the goods actually found to be on board of the steamer (the marks, numbers, or description in the bill of lading notwithstanding); nor for loss of weight; nor for detention, delay, or deviation.

"Such bills of lading also frequently exempt the carrier from any claim not intimated before delivery of the goods, and at the same time provide that the master porterage of the goods on arrival of the steamer shall be done by the steamship owners or their agents at the expense and risk of the receivers, so that the receivers have no opportunity before the delivery of their goods of ascertaining whether they are damaged or not, or how or in what part of the hold of the vessel they may have been stowed.

"That bills of lading have thus become so lengthened, complex, and involved, that in the ordinary course of business it is almost impossible for shippers of goods to read or check their various conditions, even if objections would be listened to, and the hardship is aggravated by the fact that new and more stringent conditions are constantly being added by the shipowners to provide for new questions or claims that may have arisen.

"That a striking illustration of this is the fact that recently a clause has been added to certain steamship forms of bill of lading actually giving the shipowners a right of lien over, and the right to sell the goods entrusted to them for carriage, not only for the freight upon the goods themselves, but for all debts due, either by the shippers, or the consignees of such goods, to the carriers or their agents, though these debts may have arisen on contracts unconnected with the carriage of such goods. The effect of this clause is to render the bill of lading, which has been of such essential service on account of its negotiable character in promoting the commercial prosperity of Great Britain, a document unfit for negotiation,

as bankers, merchants, and others cannot safely rely upon it as a clear title to the goods; and, in consequence, your memorialists are daily finding themselves more and more hampered in the conduct of their business."

In addition to the exactions referred to above, we call attention to others so humiliating to an American citizen that the mere mention of them ought to be sufficient ground for the passage of this act. For instance, the Erie Despatch Company issues a bill of lading containing a clause as follows:

"XVI.—Also, in case of property carried by any vessel destined to a British port, or to any other port by a British vessel, this contract shall be governed so far as regards the responsibility of the trans-oceanic vessel and her owners, by the law of England, with reference to which law this part of the contract is made."

The International Navigation Company general agents, Philadelphia, appearing for the American line and others, submitted to the writer of this an argument in opposition to the passage of this bill, to which is attached a blank bill of lading to show the form of those issued by them. It contains the following provision:

"The liability of the carrier, under this bill of lading, shall be governed by the law of England, with reference to which this contract is made."

To instance the hardships and losses which shippers have to submit to without remedy, we call attention to the statement made by one of the leading exporters of flour. That in one instance the master of an English Atlantic steamer had caused kerosene to be loaded next to a quantity of flour in such a careless manner that all the flour was utterly ruined. The English courts held that under the provisions of the bill of lading which the shipper had signed he had no remedy.

The bill herewith reported is extremely liberal in its provisions. It permits carriers to insert in bills of lading all the reasonable exemptions from liability that they can justly demand. But it prohibits them from inserting provisions such as those cited and others equally onerous.

The committee recommend the following amendments:

"In lines 4 and 5, on page 1, strike out the words "common carriers, whether by land or water," and insert in lieu thereof the following: "Vessels transporting merchandise or property from or between ports of the United States and foreign ports."

Amend in line 4, on page 3, by inserting after the word "agent" the following, "connecting carrier."

Strike out all of Section 6 and insert in lieu thereof:

"Sec. 6. This act shall not be held to modify or repeal the provisions of Sections 4281, 4282 and 4283 of the Revised Statutes of the United States."

As thus amended the bill relates solely to cargoes of vessels in the foreign trade, and the committee recommends its passage."

Cong. Record, Vol. 24, Part 1 (52nd Cong., 2d Sess.) p. 148.

Appendix B.

52D CONGRESS,
2D SESSION.

H. R. 9176.

IN THE SENATE OF THE UNITED STATES.

DECEMBER 20, 1892.

Read twice and Referred to the Committee on Commerce.

JANUARY 28, 1893.

Reported by Mr. FRYE with amendments, viz: Omit the parts struck through and insert the parts printed in *italics*.

AN ACT

Relating to contracts of common carriers and to certain obligations, duties, and rights in connection with the carriage of property.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That it shall not be lawful for ~~any common carrier or~~ the manager, agent, master, or owner of any vessel transporting merchandise or property from or between ports of the United States and foreign ports to insert in any bill of lading or shipping document any clause, covenant or agreement whereby it, he or they shall be relieved from liability for loss or damage arising from negligence, fault, or failure in proper loading, stowage, custody, care, ~~in transport~~, or proper delivery of any and all lawful merchandise or property committed to its or their charge, ~~nor shall it be lawful to limit its or their liability to less than a full indemnity to the legal claimant for any loss or damage therefrom, and any~~. *Any* and all words or clauses of such import inserted in bills of lading or shipping receipts shall be null and void and of no effect.

SEC. 2. That it shall not be lawful for any vessel transporting merchandise or property from or between ports of the United States of America and foreign ports, her owner, master, agent or manager, to insert in any bill of lading or shipping document any covenant or agreement whereby the obligations of the owner or owners of said vessel ~~to~~ *to exercise due dili-*

gence to properly equip, man, provision, and outfit said vessel, and *to* make said vessel seaworthy and capable of performing her intended voyage, or ~~any covenant or agreement~~ whereby the obligations of the master, officers, agents, or servants to carefully handle and stow her cargo and to care for and properly deliver same shall in anywise be lessened, weakened, or avoided.

SEC. 3. That if *the owner of* any vessel transporting merchandise or property ~~between~~ *to or from any* ~~ports~~ *port* in the United States of America ~~and foreign ports~~ shall ~~on starting on her voyage, be~~ *exercise due diligence to make the said vessel* in all respects seaworthy and properly manned, equipped, and supplied, neither the vessel, her owner or owners, agent, or master *or charterers* shall become or be held responsible for damage or loss resulting from ~~error of judgment~~ *faults or errors* in navigation or in the management of said vessel ~~if navigated with ordinary skill and care, from the time of her leaving her usual place of loading on her intended voyage until her arrival at the usual place of discharge at her port of delivery~~, nor shall the *vessel, her* owner or owners, ~~the vessel~~, *agent*, or master be held liable for losses arising from dangers of the sea *or other navigable waters*, acts of God, or public enemies, ~~or in saving life, and it may be stipulated in bills of lading and shipping receipts that the vessel may render services to property in distress afloat and tow same to the nearest and most convenient port of safety without incurring penalties from deviation in rendering such service~~ *or the inherent defect, quality, or vice of the thing carried, or seizure under legal process, or for loss resulting from any act or omission of the shipper or owner of the goods, his agent or representative, or from saving or attempting to save life or property at sea, or from any deviation in rendering such service.*

SEC. 4. ~~That it shall be the duty of the owner or owners, agent, managers, or other authorized person to issue to shippers of any lawful merchandise a bill of lading or shipping document stating the marks, packages, or quantity and apparent condition, of such merchandise or property delivered to and received by the owner, master, or agent of the vessel for transportation, and the voyage, or ports at which such vessel is intended to touch, and such document shall be evidence of the responsibility of the vessel for the merchandise therein described.~~ *That it shall be the duty of the owner or owners, master, or agent of any vessel transporting merchandise or property from or between ports of the United States and foreign ports to issue to shippers of any lawful merchandise a bill of lading, or shipping document, stating, among other things, the marks necessary for identification, number of packages, or quantity, stating whether it be carrier's or shipper's weight, and apparent order or condition of such merchandise or property delivered to and received by the owner, master or agent of the vessel for transportation, and such document shall be prima facie evidence of the receipt of the merchandise therein described.*

SEC. 5. ~~That it shall be the duty of the collector of the port in which the vessel is lying to refuse clearance to a vessel from said port if he is informed and is satisfied that the owner, master, agent, connecting carrier,~~

~~or other person representing such vessel has issued bills of lading for merchandise or property containing clauses that are declared not lawful by section one or section two of this act, or if he is informed and is satisfied that the owner, agent, master or other person representing such vessel will not issue bills of lading, as required by section four of this act, for merchandise or property delivered to and received by the vessel for transportation; and the said collector shall withhold clearance papers to said vessel until bills of lading or shipping documents are issued to conform to the said first, second, and fourth sections of this act, or if documents have been previously issued until they are modified to conform to the requirements of said sections.~~ *That for a violation of any of the provisions of this act the agent, owner, or master of the vessel guilty of such violation, and who refuses to issue on demand the bill of lading herein provided for shall be liable to a fine not exceeding two thousand dollars. The amount of the fine and costs for such violation shall be a lien upon the vessel, whose agent, owner, or master is guilty of such violation, and such vessel may be libelled therefor in any district court of the United States, within whose jurisdiction the vessel may be found. One-half of such penalty shall go to the party injured by such violation, and the remainder to the Government of the United States.*

SEC. 6. That this act shall not be held to modify or repeal sections forty-two hundred and eighty-one, forty-two hundred and eighty-two, and forty-two hundred and eighty-three of the Revised Statutes of the United States, *or any other statute defining the liability of vessels, their owners, or representatives.*

SEC. 7. *Sections one and four of this act shall not apply to the transportation of live animals.*

SEC. 8. That this act shall take effect from and after the first day of ~~September~~ *July*, eighteen hundred and ~~ninety-two~~ *ninety-three.*

Passed the House of Representatives December 15, 1892.

Attest : JAMES KERR,
Clerk.

Amend the title so as to read : "An act relating to navigation of vessels, bills of lading, and to certain obligations, duties, and rights in connection with the carriage of property."

Appendix C.

27 STATUTES AT LARGE, 2D SESSION, CH. 105.

AN ACT relating to navigation of vessels, bills of lading, and to certain obligations, duties, and rights in connection with the carriage of property.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress Assembled, That it shall not be lawful for the manager, agent, master, or owner of any vessel transporting merchandise or property from or between ports of the United States and foreign ports to insert in any bill of lading or shipping document any clause, covenant, or agreement whereby it, he, or they shall be relieved from liability for loss or damage arising from negligence, fault, or failure in proper loading, stowage, custody, care, or proper delivery of any and all lawful merchandise or property committed to its or their charge. Any and all words or clauses of such import inserted in bills of lading or shipping receipts shall be null and void and of no effect.

SEC. 2. That it shall not be lawful for any vessel transporting merchandise or property from or between ports of the United States of America and foreign ports, her owner, master, agent or manager, to insert in any bill of lading or shipping document any covenant or agreement whereby the obligations of the owner or owners of said vessel to exercise due diligence properly equip, man, provision, and outfit said vessel, and to make said vessel seaworthy and capable of performing her intended voyage, or whereby the obligations of the master, officers, agents, or servants to carefully handle and stow her cargo and to care for and properly deliver same, shall in any wise be lessened, weakened, or avoided.

SEC. 3. That if the owner of any vessel transporting merchandise or property to or from any port in the United States of America shall exercise due diligence to make the said vessel in all respects seaworthy and properly manned, equipped, and supplied, neither the vessel, her owner or owners, agent, or charterers shall become or be held responsible for damage or loss resulting from faults or errors in navigation or in the management of said vessel, nor shall the vessel, her owner or owners, charterers, agent, or master be held liable for losses arising from dangers of the sea or other navigable waters, acts of God, or public enemies, or the inherent defect, quality, or vice of the thing carried, or from insufficiency of package, or seizure under legal process, or for loss resulting from any act or omission of the shipper or owner of the goods, his agent or representative, or from saving or attempting to save life or property at sea, or from any deviation in rendering such service.

SEC. 4. That it shall be the duty of the owner or owners, master or agent of any vessel transporting merchandise or property from or between ports of the United States and foreign ports to issue to shippers of any lawful merchandise a bill of lading, or shipping document, stating, among

other things, the marks necessary for identification, number of packages, or quantity, stating whether it be carrier's or shipper's weight, and apparent order or condition of such merchandise or property delivered to and received by the owner, master, or agent of the vessel for transportation, and such document shall be prima facie evidence of the receipt of the merchandise therein described.

SEC. 5. That for a violation of any of the provisions of this act the agent, owner, or master of the vessel guilty of such violation, and who refuses to issue on demand the bill of lading herein provided for, shall be liable to a fine not exceeding two thousand dollars. The amount of the fine and costs for such violation shall be a lien upon the vessel, whose agent, owner, or master is guilty of such violation, and such vessel may be libelled therefor in any district court of the United States, within whose jurisdiction the vessel may be found. One-half of such penalty shall go to the party injured by such violation, and the remainder to the Government of the United States.

SEC. 6. That this act shall not be held to modify or repeal sections forty-two hundred and eighty-one, forty-two hundred and eighty-two, and forty-two hundred and eighty-three of the Revised Statutes of the United States, or any other statute defining the liability of vessels, their owners, or representatives.

SEC. 7. Sections one and four of this act shall not apply to the transportation of live animals.

SEC. 8. That this act shall take effect from and after the first day of July, eighteen hundred and nine-three.

Approved, February 13, 1893.